



The Conflict Between Federal Acquisition Reform and  
Executive Order 12,969 (Federal Acquisition and Community Right-To-Know):  
What's Best for the Environment or What's Best for Politics?

By

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**THE CONFLICT BETWEEN FEDERAL ACQUISITION REFORM AND  
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**INTRODUCTION**

During remarks celebrating an environmental victory regarding significant reduction of toxic releases in Baltimore, Maryland, on 8 August, 1995, President Clinton related a story which he claimed fueled his interest in a community's right to know about chemical releases:

This is an issue that's very personal with me. I've dealt with the whole issue of right-to-know around [sic] chemicals for nearly 20 years now, since I was a young attorney general and a train loaded with chemicals in car after car blew up in a small southern town in the southern part of my State where a relative of mine was the sheriff. And it was just a God's miracle that we didn't have hundreds and hundreds of people killed in this little town. And the first thing that occurred to everybody is: Who knew what about what was on the train? Who knew what about how safely it was being carried? Who knew what about what kind of precaution should have been taken when the train pulled into the station?<sup>1</sup>

Just before leaving for Baltimore to deliver the above remarks, President Clinton signed Executive Order 12,969,<sup>2</sup> Federal Acquisition and Community Right-To-Know.<sup>3</sup> Among other things, the order requires, on Federal contracts expected to exceed \$100,000: 1) solicitations to include as an eligibility criterion that Federal contractors

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<sup>1</sup> Remarks on Environmental Protection in Baltimore, Maryland, 31 WEEKLY COMP. PRES. DOC. 1393 (Aug. 8, 1995).

<sup>2</sup> Exec. Order No. 12,969, 60 Fed. Reg. 40,989 (1995). The text of the order is set forth in the Appendix.

having Standard Industrial Classification Code designations of 20 through 39 must file for the life of the contract a Toxic Chemical Release Form ("Form R"), as described in section 313(a) and (g) of the Emergency Planning and Community Right-To-Know Act (EPCRA)<sup>4</sup>, 2) the offeror to certify in his response that he has complied with these reporting requirements and 3) the resulting contract contain a clause requiring compliance with the law.<sup>5</sup>

Since President Clinton took office in January 1993, he has issued seven executive orders dealing with environmental matters,<sup>6</sup> most of which directly effect the Federal acquisition process.

During the same administration, there has existed a unique bipartisan cooperation among the Republicans, Democrats and the President to push for Federal acquisition reform. Yet President Clinton's environmental executive orders are in many respects in direct conflict with the streamlining goals of acquisition reform, most notably and recently the executive order discussed above requiring various certifications and contract clauses regarding toxic releases.

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<sup>3</sup> Remarks on Environmental Protection, *supra* note 1.

<sup>4</sup> 42 U.S.C. §11023(a) and (g).

<sup>5</sup> Exec. Order No. 12,969, *supra*.

<sup>6</sup> These executive orders are: Exec. Order No. 12,969 [Federal Acquisition and Community Right-To-Know], *supra*; Exec. Order No. 12,902 [Energy Efficiency and Water Conservation at Federal Facilities], 59 Fed. Reg. 11,463 (1994); Exec. Order No. 12,873 [Federal Acquisition, Recycling, and Waste Prevention], 58 Fed. Reg. 54,911 (1993), *as amended by* Exec. Order No. 12,995, 61 Fed. Reg. 13,645 (1996); Exec. Order No. 12,856 [Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements], 58 Fed. Reg. 41,981 (1993); Exec. Order No. 12,843 [Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances], 58 Fed. Reg. 21,881 (1993); Exec. Order No. 12,844 [Federal Use of Alternative Fueled Vehicles], 58 Fed. Reg. 21,885 (1993); and Exec. Order No. 12,845 [Requiring Agencies to Purchase Energy Efficient Computer Equipment], 58 Fed. Reg. 21,887 (1993).

As budgets decline, the Administration and its agencies should be looking for ways to trim unnecessary requirements for governmental systems and processes, including the Federal acquisition process. Acquisition reform is designed to do just that. The most significant "cost driver" to the Federal government in the acquisition system is socioeconomic laws and concomitant regulations.<sup>7</sup> President Reagan identified three types of potentially destructive costs caused by such regulation.<sup>8</sup> First are the enormous costs for the bureaucracy itself in administering and enforcing statutory programs.<sup>9</sup> Next are the costs to businesses, non-profit organizations, and state and local governments.<sup>10</sup> Finally are the hidden and indirect long-term effects on economic growth.<sup>11</sup> Yet "[s]ince the depression of the 1930s, the government has with increasing frequency attempted to use the economic leverage provided by its purchasing power to achieve social and economic objectives."<sup>12</sup> The Clinton Administration's environmental executive orders continue to impose environmental restrictions on government contracts that complicate the process and invariably lead to greater overall costs. The President apparently plans to continue to do so. In his same speech in Baltimore noted above, he told the crowd, "I want to continue to strengthen the right to know . . . But I want you to know something else. If

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<sup>7</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Derek Schaaf, Deputy Inspector General, DoD).

<sup>8</sup> Leon Rodriguez, *Constitutional and Statutory Limits for Cost-Benefit Analysis Pursuant to Executive Orders 12,291 and 12,498*, 15 B.C. Env'tl. Aff. L. Rev. 505, 517 (Spring 1988), citing, Program for Economic Recovery: White House Report, 17 WEEKLY COMP. PRES. DOC. 130 (Feb. 18, 1984). The Rodriguez article also discusses the "fragility" of the benefit variables incorporated into a cost-benefit analysis. Rodriguez, *supra*, at 538-40.

<sup>9</sup> Rodriguez, *supra*, at 517.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Kimberley A. Egerton, Note, *Presidential Power Over Federal Contracts Under the Federal Property and Administrative Services Act: The Close Nexus Test of AFL-CIO v. Kahn*, 1980 Duke L.J. 205.

Congress passes a law to block this kind of process in future right-to-know issues, then I will issue another Executive order to finish that job as well.”<sup>13</sup>

President Clinton isn't the only President to issue controversial executive orders. Although not directly designed to affect environmental matters, in the mid- to late 1980's, President Reagan was criticized for issuing Executive Orders 12,291<sup>14</sup> and 12,498<sup>15</sup> which allegedly delivered a crushing blow to environmental and human health agencies' ability to formulate regulations.<sup>16</sup> Executive Order 12,291 provided for centralized oversight of agency rule making and allowed agencies to issue regulations only where benefits exceed costs.<sup>17</sup> It also required that each Federal agency prepare a "Regulatory Impact Analysis" to be submitted, along with proposed or final rules, to the Director of the Office of Management and Budget.<sup>18</sup> Executive Order 12,498 required OMB review before initiation of a rulemaking proposal.<sup>19</sup> The order implemented this scheme by requiring

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<sup>13</sup> Remarks on Environmental Protection, *supra* note 1.

<sup>14</sup> Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. at 31.

<sup>15</sup> Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

<sup>16</sup> Rodriguez, *supra*, note 8.

<sup>17</sup> Exec. Order No. 12,291 at § 2(a) and Preamble.

<sup>18</sup> *Id.* at § 3(c)(2). The alleged harm to environmental and public health agencies was described in this way:

Public health and environmental regulations involve variables for which dollar values can only be assigned artificially. Some values, aesthetic and moral, simply do not submit to the type of empirical inquiry through which quantitative values might be assigned. In the case of health factors, quantification, while perhaps possible, presents a wide variety of practical and moral problems. To begin with, any assignment of values between human life and death is intuitively problematic, perhaps even morally offensive. But, more importantly, health regulations must choose not merely between life and death but also among comparative degrees of sickness and health.

Rodriguez, *supra* note 8, at 507 (footnotes omitted). Another burden on the Environmental Protection Agency came under the Nixon and Ford Administrations' "Quality of Life" review scheme which "altered the vigor with which the agency conducted its mission" and the requirement for agencies to submit "Economic Impact Statements" to the Council on Wage and Price Stability when promulgating regulations. *Id.* at 513.

<sup>19</sup> Exec. Order No. 12,498, § 1.

each agency to submit a "draft regulatory program" at the beginning of each year.<sup>20</sup> This program had to discuss all the regulatory plans of the agency for the calendar year.<sup>21</sup> Under Executive Order 12,498, the Director of the Office of Management and Budget considered "the consistency of the draft regulatory program with the Administration's policies and priorities and the draft regulatory programs submitted by other agencies."<sup>22</sup> President Reagan pitted himself against Congress with these and other measures and gained the reputation of an "anti-environmental" President. The pendulum has come full swing now with President Clinton as the protagonist for the environment and the 104<sup>th</sup> Congress, or at least a good portion of its members, as the antagonists.

This paper attempts to synthesize two seemingly unrelated concepts—Federal acquisition reform and presidential power to issue executive orders—and proposes that the current administration has overstepped its bounds with regard to Executive Order 12,969 in that it directly conflicts with the goals of acquisition reform.

Chapter One of this paper examines the history and development of attempts to streamline and reform the Federal acquisition process with particular emphasis on the Federal Acquisition Streamlining Act of 1994<sup>23</sup> (hereinafter FASA) and the Federal Acquisition Reform Act of 1996<sup>24</sup> (hereinafter FARA) and their provisions for commercial items. Chapter Two discusses the sources and history of the President's authority to issue executive orders in the context of the separation of powers doctrine. Chapter Three

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at § 2(a).

<sup>22</sup> *Id.* at § 3(a)(i).

<sup>23</sup> Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 40 U.S.C. and 41 U.S.C.).

<sup>24</sup> Pub. L. No. 104-106, 110 Stat. 186 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

illustrates how acquisition reform legislation and the separation of powers doctrine both conflict with Executive Order 12,969, particularly with regard to major purchases. Chapter Four shows how Executive Order 12,969 is redundant and why it should be repealed.

The legislature focused on the Department of Defense (DoD) in passing the FASA,<sup>25</sup> and, although acquisition reform applies to all agencies of the Federal government, this paper tends to highlight its application to the DoD.<sup>26</sup>

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<sup>25</sup> See, e.g., *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12369 (1994) (statements of Senators Glenn, Nunn, Thurmond, Roth, Levin, Smith, and McCain).

<sup>26</sup> DoD's impact on the environment is significant as well:

. . . DoD alone represents almost one percent of the population and controls 25 million acres of land with an annual budget that greatly exceeds that of the largest Fortune 500 company. DoD's impact on the environment ranges from household garbage generated by military base housing to hazardous wastes to waste oil from the motor pool. Additionally the "tools" used by DoD (weapons of war) are designed fundamentally from a standpoint of controlled lethality—a concept generally at odds with slogans like "environmentally friendly" . . .

Laurent R. Hourclé. *Federal Facilities 3-4* (Feb. 18, 1996) (class materials, on file with author).



## CHAPTER ONE: HISTORY OF FEDERAL ACQUISITION

### STREAMLINING AND REFORM

#### A. Federal Acquisition In General

As the nation's largest entity—and biggest polluter<sup>27</sup>—the Federal government spent about \$450 billion for goods and services in 1994.<sup>28</sup> The Department of Defense accounts for about 70 percent of that sum,<sup>29</sup> and spends about \$80 billion a year on weapons and research alone.<sup>30</sup> The fiscal year 1996 Federal budget is 1.612 trillion dollars, about 250 billion dollars more than the combined total budgets of all state and local governmental organizations combined.<sup>31</sup> But the defense budget is continuing to decline in real buying power as a result of changing defense priorities.<sup>32</sup> Total budgets are projected to fall 40 percent between 1985 and 1997 with most of the cuts occurring in procurement—60 to 65 percent by 1996-97.<sup>33</sup>

To counter these declining budgets, Defense Secretary William J. Perry and his acquisition associates are trying to save a third to one-half of the cost of weapon systems by applying lessons they learned in streamlining the acquisition process from previous

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<sup>27</sup> *Id.* at 1.

<sup>28</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12376 (1994) (statement of Senator Roth).

<sup>29</sup> *Id.* at 12377.

<sup>30</sup> Dana Priest, *Pentagon's Latest Acquisition: Private-Sector Purchasing Practices*, *The Washington Post*, May 2, 1996, at A27.

<sup>31</sup> Hourclé, *supra*, note 26, at 1.

<sup>32</sup> Lt Col Mark C. Mondl and Richard Whitney, *Aeronautical Systems Center Acquisition Reform Acceleration Stand Down Day Briefing Slides* (May 31, 1996) (on file with authors).

<sup>33</sup> *Id.*

business experiences in the private sector.<sup>34</sup> Perry and others see these savings as the source of money for new weapons.<sup>35</sup> By using standard commercial business practices in developing and building military equipment, DoD is buying more parts produced for commercial use rather than from factory processes set up uniquely for military products.<sup>36</sup> According to Senator Nunn, Secretary of Defense Perry “has articulated a vision of an acquisition system that manages rather than avoids risk.”<sup>37</sup>

This ability to use commercial practices hasn’t always been available, however. A cumbersome, broken system produced good weapons but in a wasteful and inefficient manner.<sup>38</sup> A 1991 Defense Sciences Board Task Force study determined that the time it takes DoD to field a new weapon has increased 60 percent over the last forty years, while the private sector is able to create high technology commercial products in a fraction of the time it took in the 1960s.<sup>39</sup> An interesting illustration came during testimony before Congress on continued acquisition reform: “The contract for the B-47 . . . is about seventy pages. In contrast, the paperwork for the C-5A is so bulky it would take five C-5A’s (our military’s largest transporter) to carry it.”<sup>40</sup> “[W]e have produced—all in the

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<sup>34</sup> Priest, *supra*, note 30.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12372 (1994) (statement of Senator Nunn).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 12377 (statement of Senator Roth).

<sup>40</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, office of Federal Procurement Policy, Office of Management and Budget), *quoting* Speaker of the House Newt Gingrich.

name of ‘competition’—a system that bears virtually no resemblance to the competition that has made our commercial marketplace the envy of the world.”<sup>41</sup>

This “broken” system has only recently been replaced by a streamlined system with emphasis on commercial items and practices.

## **B. Early Attempts at Reform**

Previous efforts at acquisition reform have included studies by the Hoover Commission in both 1949 and 1955, the Fitzhugh Commission in 1969, the Commission on Government Procurement in 1972, the Carlucci Initiatives (1981), the Grace Commission in 1982, the Packard Commission in 1986, and the Defense Management Review in 1989.<sup>42</sup>

Reform in its present form really began in 1972 when the Commission on Government Procurement advocated replacing government-unique items with commercial items to avoid high costs.<sup>43</sup> Later, DoD promoted commercial products with its Acquisition and Distribution of Commercial Products Program by eliminating government specifications and contract clauses that didn’t reflect commercial practices.<sup>44</sup>

Various statutes also attempted to instill the virtue of commercial practices in the minds of contracting officers. In 1984, Congress required Federal agencies to “promote the use of commercial products whenever practicable” with the Competition in

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<sup>41</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, Office of Federal Procurement Policy, Office of Management and Budget).

<sup>42</sup> Lt Col Mark C. Mondl and Richard Whitney, Aeronautical Systems Center Acquisition Reform Acceleration Stand Down Day Briefing Slides (May 31, 1996) (on file with authors).

<sup>43</sup> DEP’T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION: REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS, 8-3 (Jan. 1993).

<sup>44</sup> *Id.*

Contracting Act (CICA).<sup>45</sup> The Defense Procurement Reform Act of 1984 required DoD to use standard or commercial parts when developing defense-specific products when technically acceptable and cost effective.<sup>46</sup>

The President's Blue Ribbon Commission on Defense Management (the Packard Commission) again stressed the results of using commercial items in its June 1986 report—lower costs and shorter lead times in producing new products and systems. The report recommended DoD “. . . make greater use of component systems, and services available ‘off-the-shelf.’ It should develop new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements.”<sup>47</sup>

Further legislation in 1986 directed DoD to use “nondevelopmental items,” those supply items available on the commercial market, and to attempt to break its long-standing tradition of using military specifications.<sup>48</sup> Congress directed DoD in 1989 to issue streamlined regulations covering commercial products and to rescind inconsistent regulations;<sup>49</sup> to ensure inspection and warranty clauses were consistent with commercial practices;<sup>50</sup> to revise regulations implementing the catalog and market price exemption to

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<sup>45</sup> *Id.* citing 10 U.S.C. § 2301(b)(6). This section has been repealed. The Competition in Contracting Act was Pub. L. 98-369, 98 Stat. 1175 (current version at 41 U.S.C. § 253) (1984).

<sup>46</sup> DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION, at 8-3, citing Pub. L. No. 98-525, § 1202, 98 Stat. 2588 (1984).

<sup>47</sup> *Id.* at 8-3, citing *President's Blue Ribbon Commission on Defense Management, Final Report: A Quest for Excellence* 60 (1986).

<sup>48</sup> *Id.* at 8-4, citing National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 907, 100 Stat. 3816, 3917 (1986), adding 10 U.S.C. § 2325.

<sup>49</sup> *Id.*, citing National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b)(1), 103 Stat. 1352, 1505 (1989).

<sup>50</sup> National Defense Authorization Act for Fiscal Year 1990 and 1991, at §§ 804(b)(4), 804(b)(5).

the Truth in Negotiation Act (TINA)<sup>51</sup> to foster the purchase of nondevelopmental items without a requirement for cost or pricing data,<sup>52</sup> and finally, to conduct market research to determine whether nondevelopmental items are available and suitable to meet DoD's needs.<sup>53</sup>

In 1990 the "Section 800" Panel was created to come up with a set of workable changes to resolve the problems of the federal acquisition system.<sup>54</sup> Despite this overwhelming interest by industry and the government to ensure greater acquisition of commercial items, the Section 800 Panel nevertheless concluded "... none of the legislation passed to date has actually caused or permitted commercial items to be procured in abundance by DoD."<sup>55</sup> The Section 800 Panel gave many reasons for this failure. The one most important for the subject of this paper is that:

Legislation has not created exemptions from socioeconomic laws, trade restrictions, and **Executive Orders and implementing regulations**, or from procurement integrity, costing, audit, and other requirements, all of which require a commercial company to fundamentally alter the way it conducts business.<sup>56</sup>

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<sup>51</sup> DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION at 8-5, *citing* 10 U.S.C. § 2306a(b)(1)(B).

<sup>52</sup> *Id.* *citing* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b)(6), 103 Stat. 1352 (1989). According to Senator Glenn, contractors' number one complaint is the burden of collecting cost data for the government. *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12370 (1994):

Because TINA has no parallel in the commercial marketplace, it has been cited as a major deterrent to the willingness of commercial producers to sell their products to the government. It has also led government contractors to establish costly and duplicative parallel operations for their commercial divisions so that their private sector operations and sales will not be burdened with TINA requirements.

*Id.* at 12375 (statement of Senator Nunn).

<sup>53</sup> DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION, at 8-5, *citing* National Defense Authorization Act for Fiscal Year 1991 Pub. L. No. 101-510, § 814, 104 Stat. 1485, 1595 (1990), *amending* 10 U.S.C. § 2325(a).

<sup>54</sup> *See, infra*, note 82 and accompanying text for further information on the Section 800 Panel.

<sup>55</sup> DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION at 8-5.

<sup>56</sup> *Id.* at 8-6 (emphasis added).

The Section 800 Panel found that recent studies uniformly concluded that myriad Federal laws and regulations which apply only to Federal—and particularly DoD—contractors had created significant barriers to the entry of commercial firms into Federal contracting. These barriers are the statutes which require government contractors to adopt unique, expensive business practices under the threat of extraordinary civil and criminal penalties.<sup>57</sup> The Section 800 Panel found that socioeconomic legislation was one of four items<sup>58</sup> that created the greatest barriers:

A buyer in the commercial marketplace seldom if ever insists that a seller change its hiring, promotion, compensation, benefits, subcontracting, or transportation practices as a condition of making a sale. But the Federal Government does this as a matter of course in almost every contract it awards. The problem is not that any particular requirement is so onerous as to dissuade companies from dealing with the Federal Government: but when a combination of frequently changing requirements are levied on contractors—some inconsistent with others, most requiring audit and the generation of reports, and all inconsistent with commercial practice—the burden on commercial companies is very great.<sup>59</sup>

The Section 800 Panel summed up the early effort at acquisition reform with regard to commercial items as “one of good intentions that has failed to bear fruit because none of the efforts to date have created a complete, systematic statutory and regulatory structure for buying commercial products.”<sup>60</sup>

Commercial products obviously weren’t the only problem. Cost increases on the order of 20 to 40 percent were common on major programs, with many programs

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<sup>57</sup> *Id.* at 8-7.

<sup>58</sup> The others are accounting systems, specifications and standards, and rights in technical data. *Id.*

<sup>59</sup> *Id.* at 8-9.

<sup>60</sup> *Id.* at 8-10.

experiencing much greater cost overruns.<sup>61</sup> Senator Roth reported that problems were most evident in the DoD where “virtually every major weapon system currently being developed is experiencing cost and schedule problems.”<sup>62</sup> Army programs were over budget by as much as 167 percent, Navy programs by as much as 56 percent, and Air Force programs by as much as 169 percent.<sup>63</sup> On average it takes over 16 years for a program manager to perform the 840 steps needed to field a new weapon.<sup>64</sup>

Obviously a real solution to the problem was needed. The next section discusses the origins of the solution and the current posture of acquisition reform.

### **C. Contemporary Enactments**

#### **1. Origins and Development of the FASA**

Some amount of regulation and oversight is necessary, of course, because of the public trust function of the government in a democracy,<sup>65</sup> and the task became to find the proper balance. The late 1970s and early 1980s unfortunately represented a growing adversarial relationship between the Federal government and its contractors.<sup>66</sup> Because of increased regulatory requirements, firms, particularly smaller ones, either were deterred from pursuing defense business or experienced greatly increased costs as a result. This

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<sup>61</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12377 (1994) (statement of Senator Roth).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12370 (1994) (statement of Senator Glenn).

<sup>66</sup> Senator Jeff Bingaman, *Twelfth Annual Gilbert A. Cuneo Lecture: The Origins and Development of the Federal Acquisition Streamlining Act*, Lecture at the 1995 Government Contract Law Symposium at the Judge Advocate General's School, United States Army (Jan. 9, 1995), reprinted in 145 Mil. L. Rev. 149, 150 (Summer 1995).

overregulation had an obvious adverse impact on the defense and industrial and technology base and on innovation and risk-taking.<sup>67</sup>

Although Congress was extremely generous in funding defense programs during the 1980s, that generosity was accompanied by an unprecedented level of scrutiny . . . extend[ing] beyond concern about specific weapons systems and into detailed concern with the acquisition process. At times, it seemed that every publicized incident of fraud, waste, or abuse—real or perceived—was accompanied by a legislative fix.<sup>68</sup>

In 1987, Senator Jeff Bingaman was appointed as the first chairman of a new Senate Subcommittee under the Senate Armed Services Committee, the Subcommittee on Defense Industry and Technology, to oversee defense acquisition policy and the defense industrial and technology bases.<sup>69</sup> The Subcommittee performed a full review of defense acquisition policy, hearing testimony from leading government officials, the defense industry, academic experts, and the oversight community.<sup>70</sup>

The Subcommittee directed DoD to identify statutory provisions with a negative impact on innovation and established an Industry Advisory Group to highlight aspects of the process that influenced innovation and drained talent away from defense industries.<sup>71</sup> The Industry Advisory Group drafted twenty issue papers on ways to simplify Federal acquisition.<sup>72</sup>

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<sup>67</sup> *Id.* at 150, 151.

<sup>68</sup> *Id.* at 150.

<sup>69</sup> *Id.* at 151.

<sup>70</sup> *Id.*, citing *Department of Defense Authorization for Appropriations for Fiscal Years 1988 and 1989: Hearings on S. 1174 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., pt. 7 at 3370-574 (1987).

<sup>71</sup> Bingaman, *supra*, note 66, at 151, citing S. REP. NO. 326, 100<sup>th</sup> Cong., 2d Sess. 12 (1987).

<sup>72</sup> *Id.* at 152 and n 8. The Industry Advisory Group's Report is reprinted in *Department of Defense Authorization for Appropriations for Fiscal Year 1989: Hearings on S. 2355 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 100<sup>th</sup> Cong., 2d Sess., pt. 7, at 661-729 (1988).



The DoD, however, was slow to respond. In its 1988 legislative package, it proposed changes in only five statutes.<sup>73</sup> Despite repeated encouragement from the Subcommittee, including legislative direction, the DoD only produced an insubstantial and incomplete report recommending only twelve statutory changes with no justification or supporting analysis.<sup>74</sup>

Secretary of Defense Cheney initiated the Defense Management Review (DMR) in 1989, emphasizing acquisition reform. But again, proposals and recommendations from DoD, namely eighteen proposed statutory changes introduced in 1990 as “The Defense Management Improvement Act,”<sup>75</sup> consisted only of broad principles with no justification or supporting analysis.<sup>76</sup> Despite the urgings of ranking members of the Subcommittee for the DoD to provide the detailed analysis, DoD was still unable to come through.<sup>77</sup> It made little headway in tailoring its tens of thousands of detailed military specifications to the commercial marketplace. As an example, DoD reviewed a 37-page military specification for residential heat pumps—and managed to shorten it to 36 pages.<sup>78</sup> The theme of DoD’s proposals was merely to request “broad authority to waive the acquisition

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<sup>73</sup> Bingaman, *supra* note 66, at 152.

<sup>74</sup> *Id.* at 153.

<sup>75</sup> *Id.* at 154, citing *Department of Defense Authorization for Appropriations for Fiscal Year 1991: Hearings on S. 2884 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 101<sup>st</sup> Cong., 2d Sess., pt. 6, at 1263-1317 (1990).

<sup>76</sup> Bingaman, *supra*, note 66, at 153-54. Another authority considered DoD’s efforts to be substantial. Professor Hourclé reports that the DMR “examined 78 environmental statutes and some 8,000 pages of accompanying regulations. Of these, 21 statutes were identified as having a potential significant impact on DoD in terms of direct operational impact or potential for significant cost impact.” Hourclé, *supra* note 26, at 5.

<sup>77</sup> Bingaman, *supra*, note 66, at 154.

<sup>78</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12378 (1994) (statement of Senator Levin).

laws.”<sup>79</sup> Senator Glenn attributed this inability to reform by all Federal agencies, not just DoD, to the fact that “. . . the procurement system impacts across the spectrum of interests in our society, and it has overlaid upon it nonprocurement programs which seek to address various social and economic policy concerns. Reconciling all of these interests and policy concerns [was] not . . . easy.”<sup>80</sup>

Yet the government knew acquisition reform was vital. A 1991 study by the Logistics Management Institute determined that a single Navy command had saved over \$15 million dollars by substituting commercial standards for thermal insulation, vehicle paint, fire and rescue trucks, and generators and floodlights.<sup>81</sup> Clearly, more had to be done.

#### **The “Section 800 Panel”**

Finally, in apparent desperation, legislation was passed in 1990 to create the “Section 800” Panel to “encourage government and private sector cooperation for the development of acquisition reform legislation.”<sup>82</sup> DoD was required to form an Advisory Panel on Streamlining and Codifying the Acquisition Laws, composed of experts in procurement laws and policies with diverse experiences in the public and private sectors.<sup>83</sup> The Section 800 Panel was not to cover the same ground that was covered by numerous studies of the acquisition system since the end of World War II. Rather its goal was to

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<sup>79</sup> Bingaman, *supra*, note 66 at 154 *citing* S. REP. NO. 707, 101<sup>st</sup> Cong., 2d Sess. 189, 193 (1990).

<sup>80</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12369 (1994) (statement of Senator Glenn).

<sup>81</sup> *Id.* at 12378.

<sup>82</sup> Bingaman, *supra*, note 66, at 155. The panel was named after Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990).

<sup>83</sup> Bingaman, *supra* note 66, at 155, *citing* Pub. L. No. 101-510, §800(b), 104 Stat. 1485 (1990), 10 U.S.C. 2430 note.

take the general principles set forth by groups such as the Packard Commission and the Defense Management Review and come up with a workable set of recommended changes.<sup>84</sup> The Section 800 Panel was required to:

First, review the acquisition laws . . . with a view towards streamlining the acquisition process. Second, recommend repeal or amendment of existing laws to the extent necessary to eliminate . . . laws that are unnecessary for the establishment and administration of buyer and seller relationships in procurement; ensure the continuing financial and ethical integrity of defense procurement programs; and protect the best interests of the Department of Defense.<sup>85</sup>

The legislative directive also included a specific reporting format, requiring the Section 800 Panel to list each specific acquisition law—giving its legislative history; the role of the law in acquisition practice; a recommendation whether the law should be retained, repealed, or modified; and a detailed legislative proposal with a sectional analysis.<sup>86</sup> DoD had until January 15, 1991, to establish the Section 800 Panel, and the report was to be completed and presented to Congress by January 15, 1993.<sup>87</sup>

DoD did not, however, appoint members to the Section 800 Panel until September 1991.<sup>88</sup> Eight months behind schedule, thirteen members, seven from the public sector and six from the private sector, diligently set about their work and reported to the Senate Defense Industry and Technology Subcommittee in June 1992 on their progress.<sup>89</sup> The Section 800 Panel reviewed nearly 1000 sections of the U.S. Code and Public Laws related to DoD acquisitions and recommended that 25 percent be removed from the study

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<sup>84</sup> Bingaman, *supra*, note 66, at 155.

<sup>85</sup> *Id.* at 156, *citing* Pub. L. No. 101-510, § 800(c).

<sup>86</sup> *Id.* at 156-57, *citing* S. REP. NO. 384, 101<sup>st</sup> Cong., 2d Sess. 194, 194-95 (1990).

<sup>87</sup> *Id.* at 157.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 158.

as not acquisition-related, 15 percent be repealed, 20 percent be amended, 15 percent not be acted on for various reasons, and 25 percent be retained without amendment.<sup>90</sup>

The Section 800 Panel produced an 1800-page report that reviewed more than 600 procurement laws alone and made specific proposals to amend or repeal nearly 300 of them.<sup>91</sup> The report addressed the fundamentals of the Federal acquisition process—auditing practices, oversight activities, competition, paperwork reduction, integrating the government and commercial sectors, and strengthening the industrial base.<sup>92</sup>

The Senate Armed Services Committee thoroughly reviewed the Section 800 Panel's recommendations during the first session of the 103d Congress.<sup>93</sup> The report enjoyed strong bipartisan support within the Committee. During hearings before the committee in 1993,<sup>94</sup> Secretary Aspin and others consistently emphasized "the high priority that the Clinton Administration had assigned to acquisition reform."<sup>95</sup> Senator Bingaman claimed that the Administration's commitment to acquisition reform was

... more than rhetorical. Steven Kelman, the new Administrator of the Office of Federal Procurement Policy, and Colleen Preston [Deputy Under Secretary of Defense for Acquisition Reform] both gave priority attention to the development of comments and proposals on acquisition streamlining measures. The Administration's commitment was essential. Enactment of a comprehensive acquisition reform bill required strong leadership from the

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<sup>90</sup> F. Whitten Peters, Summary of Major Recommendations Relating to Commercial Items, Report of the Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Law (1993) (unnumbered briefing slides).

<sup>91</sup> Bingaman, *supra* note 66, at 158, citing DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION: REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS (Jan. 1993). Chapter 8 of the report contains 58 pages of recommendations dealing specifically with commercial items.

<sup>92</sup> Bingaman, *supra*, note 66, at 158.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 159, citing *Department of Defense Authorization for Appropriations for Fiscal Year 1994 and the Future Years Defense program: Hearings on S. 1298 Before the Senate Comm. On Armed Services, 103d Cong., 1<sup>st</sup> Sess., pt. 1, at 36 (1993).*

<sup>95</sup> Bingaman, *supra*, note 66, at 158-59.

White House to unify the Executive Branch and to address the diverse concerns that would be raised both among executive agencies and in the numerous congressional committees having an interest in acquisition policy.<sup>96</sup>

The Senate Armed Services Committee believed that the post-Cold War defense “build-down” would make it difficult to maintain an adequate industrial and technology base.<sup>97</sup> It concluded that the challenge would be best met by “minimizing the nation’s dependence on defense-unique industries by encouraging the development and utilization of dual-use productions and processes that both the government and commercial sectors can use.”<sup>98</sup> Hence, the focus of the Section 800 Panel and the resulting statute on commercial items and practices were important. The committee received bipartisan support from the Senate Defense Industry and Technology Subcommittee, the Governmental Affairs Committee, the Government Management Subcommittee, and the Small Business Committee.<sup>99</sup> Senators from these committees and subcommittees established a staff working group which developed a bill that formed the basis for Senate Bill 1587, introduced on October 26, 1993.<sup>100</sup>

At the same time, the Clinton Administration, through Vice President Gore’s National Performance Review, studied many of the same issues and endorsed many of the Section 800 Panel’s recommendations. At a ceremony on October 26, 1993, at the White House, President Clinton and Vice President Gore specifically endorsed Senate Bill 1587

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<sup>96</sup> *Id.* at 159.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 160.

<sup>100</sup> *Id.*

as the vehicle for their reform efforts.<sup>101</sup> The Administration's support fostered the support of the House Armed Services and Government Operations Committees in the quest for reform.<sup>102</sup>

In the Spring of 1994, during the Second Session of the 103d Congress, the Governmental Affairs and Armed Services Committees held joint hearings with testimony from representatives of the Administration, the oversight community, and diverse segments of the private sector, including major contractors, commercial companies, and small businesses.<sup>103</sup> Before passing the FASA, the Congressional committees had testimony from DoD, GSA, OFPP, GAO, the DoD IG, the ABA, Business Executives for National Security, and a coalition of various contractor industry associations—including the Acquisition Reform Working Group, the Information Technology Association of America, the Computer and Communications Industry Association, the Small Business Legislative Counsel, the Minority Business Enterprise Legal Defense and Education Fund, and the Computer Business Equipment Manufacturers Association.<sup>104</sup> The committees heard from the spectrum of interests in the Federal procurement field.<sup>105</sup>

On June 8, 1994, the Senate passed Senate Bill 1587.<sup>106</sup> The House passed a companion bill on June 27.<sup>107</sup> After resolving numerous differences in conference, a

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 161, citing *Federal Acquisition Streamlining Act of 1993: Joint Hearings on S. 1587 Before the Senate Comm. On Governmental Affairs and the Senate Comm. On Armed Services*, 103d Cong., 2d Sess. (1994).

<sup>104</sup> Bingaman, *supra*, note 66, at 161.

<sup>105</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12369 (1994) (statement of Senator Glenn). “. . . We have all heard stories that it is too difficult to do business with the government. From cost accounting standards to socioeconomic laws, the Federal marketplace is represented to be a quagmire of laws and bureaucratic redtape.” *Id.*

<sup>106</sup> Bingaman, *supra*, note 66, at 161.

conference report was filed, approved by both Houses,<sup>108</sup> and signed into law by the President on October 13, 1994.<sup>109</sup> The result was the Federal Acquisition Streamlining Act of 1994 (FASA).<sup>110</sup> It has been called “the most significant procurement reform legislation . . . since the Competition in Contracting Act . . .”<sup>111</sup>

Senator Bingaman highlighted four aspects of the Act.<sup>112</sup> First was the streamlining effect of the Act by reducing paperwork burdens through revision and consolidation of legal provisions to make the process less redundant, more consistent, and easier to implement. Second was the electronic commerce procedures to transform the system from paper to computers. Third was the creation of a “simplified acquisition threshold” of \$100,000 to reduce the amount of staff time and costs for small purchases.<sup>113</sup> Finally was the Act’s emphasis on commercial end-items and components, including modification of commercial products to meet government needs. Senator Bingaman stressed that FASA’s implementation period of up to one year provided a unique opportunity for the Executive Branch to either fashion solid, streamlined

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<sup>107</sup> *Id.*

<sup>108</sup> Senator Glenn described it as “an improved product that represents a fine balance of the many interests affected by our procurement system.” *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12369 (1994).

<sup>109</sup> Bingaman, *supra*, note 66, at 161 (footnotes omitted).

<sup>110</sup> Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 40 U.S.C. and 41 U.S.C.).

<sup>111</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12377-378 (1994) (statement of Senator Levin).

<sup>112</sup> Bingaman, *supra*, note 66, at 162.

<sup>113</sup> Ninety-five percent of all DoD contracting actions fall below the \$100,000 threshold yet account for only five to ten percent of DoD spending. Peters, *supra*, note 90 (unnumbered briefing slides). *See also* DEP’T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION: REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS 4-8 (Jan. 1993)

implementing rules or go back to a set of acquisition rules that mirrored the old, highly regulated system.<sup>114</sup>

Acquisition Reform has produced many success stories. Among these are the “big systems”—development of JDAMs (Joint Direct Attack Munitions), which resulted in a 34 percent decrease in production time, a 50 percent decrease in cost, an 85 percent decrease in plant oversight, and a savings of over \$2.9 billion; the Army SMART-T system which saved \$540 million in costs; and the Air Force C-17 nondevelopmental aircraft which saved greater than \$5 billion overall.<sup>115</sup> Savings have occurred on the “little” items as well. Men’s T-shirts in base and post exchanges used to cost \$2.68 per package using military specifications. A brand-name commercial item of similar or superior quality is available for only \$2.44—a ten percent savings.<sup>116</sup>

But FASA hasn’t solved all of the Federal government’s acquisition woes. Senator Bingaman spoke of the “unfinished agenda” of the Section 800 Panel.<sup>117</sup> He identified defense trade, procurement ethics, protest process reform, computer acquisition policies, and waivers of socioeconomic laws for commercial acquisitions and purchases below the simplified acquisition threshold as areas still needing work.<sup>118</sup> Senator Nunn stated that the FASA “is just the beginning, not the end, of the reform effort. We have given considerable discretion to the executive branch to reinvent the acquisition process

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<sup>114</sup> Bingaman, *supra*, note 66, at 162.

<sup>115</sup> DOD ACQUISITION REFORM DAY, MAY 31, 1996, VIDEOTAPE (Hon. Paul G. Kaminsky, Under Secretary of Defense, Acquisition and Technology, 1996)

<sup>116</sup> *Id.*

<sup>117</sup> Bingaman, *supra*, note 66, at 163.

<sup>118</sup> *Id.*



from the ground up.”<sup>119</sup> The next step in the process was the Federal Acquisition Reform Act of 1996.

## 2. The Federal Acquisition Reform Act of 1996 (FARA)<sup>120</sup>—“Sibling of FASA”<sup>121</sup>

During testimony on August 3, 1995, before the House of Representatives Committee on Small Business, Steven Kelman, Administrator, Office of Federal Procurement Policy, Office of Management and Budget, purported to put forth the Administration’s views on the House’s version of FARA.<sup>122</sup> He stated,

I think you would agree that FASA represents a “win-win” situation: it gives taxpayers much-needed streamlining and it promotes increased small business participation. While we should be proud of what we have accomplished, we must remember that the task of reform has not yet been completed, for FASA focuses mainly on smaller dollar purchases. To ensure that our system effectively provides increased value to taxpayers we must also reform the way we make larger dollar buys.<sup>123</sup>

Mr. Kelman explained why change was “so critical” to the Clinton Administration. He described the problem of rigid rules and detailed prescriptions on how to manage government acquisitions as

. . . rest[ing] not with the principle of vigorous competition, but rather with the fear of discretion that we have adopted to manage this process. There is an extreme distrust towards our frontline contracting and program professionals, and a complete lack of faith in their ability to use common sense and good judgment to make sound business decisions in the best interests of the taxpayer. This flawed idea, which was once common in the

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<sup>119</sup> *Conference Agreement on S. 1587*, 103d Cong., 2d Sess., 140 Cong. Rec. 12373 (1994).

<sup>120</sup> Pub. L. No. 104-106, 110 Stat. 186 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

<sup>121</sup> One might be able to call FARA the “son” of FASA if it weren’t for the fact that it was passed less than sixteen months after the passage of FASA and while FASA was still in its infancy!

<sup>122</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, Office of Federal Procurement Policy, Office of Management and Budget).

<sup>123</sup> *Id.*

attitudes of the owners of private businesses towards their employees, has long since been abandoned in the private sector, where companies have come to realize that the skills and abilities of our workforce are this country's major competitive advantage in the world marketplace.<sup>124</sup>

Mr. Kelman advocated that the Administration's bywords were "competition yes, bureaucracy no."<sup>125</sup> It appeared obvious that the President was in favor of continuing to reform the Federal acquisition process.

Not everyone saw FARA, or FASA for that matter, as a panacea. E. Colette Nelson, the Executive Vice President, American Subcontractors' Association, testified on August 3, 1995, to the House Committee on Small Business, in relation to a proposal under the House's version of FARA<sup>126</sup> to further emphasize contractor past performance, that:

... [P]ilot programs have generally lacked an effective means of measuring a firm's past performance outside of the Federal government arena and especially its performance in the private commercial marketplace. This represents a particularly serious deficiency since one of the basic objectives of FASA was to bring more commercial firms into the government marketplace. It seems to us to be wholly inappropriate, given the status of implementation of the FASA provisions, to be actively considering a further expansion of the use of past performance in the Federal procurement process. Denying a firm the opportunity to compete on the basis of a past performance evaluation, as proposed in H.R. 1670's Contractor Verification System, is unacceptable until there has been successful experience with systems that accurately collect, verify, and disseminate past performance data.<sup>127</sup>

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<sup>124</sup> *Id.* FARA provides for increased focus on the career development needs of the acquisition workforce. See Pub. L. No. 104-106, §4307.

<sup>125</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, Office of Federal Procurement Policy, Office of Management and Budget).

<sup>126</sup> H.R. 1670, 104<sup>th</sup> Cong. (1995).

<sup>127</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of E. Colette Nelson, the Executive Vice President, American Subcontractors' Association).

The American Subcontractors' Association essentially viewed procurement reform legislation as setting up new barriers to small business participation in Federal contracts.<sup>128</sup>

But private industry groups representing small concerns weren't the only ones wary of further acquisition reform. Even certain elements within DoD, which would appear to have the most to gain from continued acquisition reform because of the sheer volume and dollar amount of its acquisitions, didn't favor some of the provisions of FARA. Derek Schaaf, the Deputy Inspector General, DoD, testified that under the current system, poor product quality was a major setback to efficient government contracting, and it could get worse if too many controls were removed from the acquisition process.<sup>129</sup> Mr. Schaaf reported that the Defense Criminal Investigative Service alone maintains an active caseload of about 400 product substitution cases per year, resulting in about 100 convictions annually.<sup>130</sup> He also stressed the extreme importance of competition in many areas: obtaining lower prices (fifteen to 30 percent savings in general), avoiding collusion or fraud, avoiding unjust favoritism, avoiding abuse in awards, and avoiding the dangers that an unchecked rush into full-scale commercial practices could produce.<sup>131</sup> He further commented:

[T]he "Federal Acquisition Reform Act of 1995," proposes to change the standard of "full and open" competition to an undefined new standard of "maximum practical" or "open access" competition. This change to a "maximum practical" standard could be used to limit competition to only those "prequalified" or "verified" vendors. I do not agree with limiting access to Government markets because it can deny firms such as new high technology companies the opportunity to bid on government contracts and

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<sup>128</sup> *Id.*

<sup>129</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Derek Schaaf, Deputy Inspector General, DoD).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

deprive us of the benefits of a broader base of suppliers, both large and small. This proposal seems to be a step backwards from trying to entice additional companies to enter the Government market. Contracting officers have flexibility to exercise sound business judgment under the current statute in determining the appropriate acquisition strategy for a procurement. We have not seen any analyses or demonstration of a problem that supports moving away from full and open competition . . . <sup>132</sup>

In the end, on February 10, 1996, Senate Bill 1124 was enacted into law.<sup>133</sup> The short title of Division D of the bill was the Federal Acquisition Reform Act of 1996.<sup>134</sup> It essentially picked up where FASA left off. It contains more sweeping reforms, including, but not limited to: 1) allowing contracting officers to limit the number of proposals in the competitive range,<sup>135</sup> 2) providing for procedures for pre-award debriefings for excluded

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<sup>132</sup> *Id.* Ultimately, FARA did not contain the "maximum practical" or "open access" competition language feared by the Deputy DoD Inspection General. Rather, it states, "The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements." Pub. L. No. 104-106, §110 Stat. 186 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

<sup>133</sup> Pub. L. No. 104-106, 110 Stat. 186 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

<sup>134</sup> *Id.* at § 4001.

<sup>135</sup> *Id.* at § 4103. "[I]ndustry has commented that they would like to know earlier in the competition if they do not have a likely chance for award. At the same time, agencies can find themselves having to expend resources they can ill afford to waste evaluating offers that are unlikely to be selected." *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, office of Federal Procurement Policy, Office of Management and Budget). See also, *Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (joint statement by the Electronic Industries Association and the National Security Industries Association). Although small business believed that the objective of creating an environment that would avoid having firms enter contract competitions which they have no realistic chance of winning was admirable, it thought FARA's solution of limiting the competitive range was the wrong one:

[S]mall firms, in particular, have no desire to expend scarce bid and proposal funds on government contract competitions that they believe are not likely to result in a contract award. . . . Excessive competition is not a real problem, but sole-source contracting is. Excessive competition has never been factually demonstrated as a systemic problem with the procurement process. . . . We believe that small firms will unilaterally avoid unwinnable contract competitions if they have adequate information to make an informed business decision. To provide access to such decisional information, the Federal buying activities need to expand their current practices of describing with more precision what product or service the agency is seeking to procure. The greater the exactitude and certitude with which the agency can define the objective of the competitive process, the more likely that potential competitors can make an informed judgment on whether to participate.

offerors<sup>136</sup> and directing that the Federal Acquisition Regulation include a provision encouraging the use of alternate dispute resolution (ADR) prior to protests,<sup>137</sup>

3) establishing requirements for the use of a two-phase selection procedure for design-build projects,<sup>138</sup> 4) excepting commercial items from the requirement for certified cost or pricing data,<sup>139</sup> 5) applying special simplified procedures for purchases greater than the simplified acquisition threshold (\$100,000) but not greater than \$5 million, where the

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*Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of E. Colette Nelson, the Executive Vice President, American Subcontractors' Association); see also *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Derek Schaaf, Deputy Inspector General, DoD). This desire and approach seems to require more specifications and paperwork and is in direct opposition to the goals of FASA and FARA.

<sup>136</sup> Pub. L. No. 104-106, § 4104, 110 Stat. 186. Small business argued that the contracting officer was given too much discretion to deny a request for a debriefing. See *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of E. Colette Nelson, the Executive Vice President, American Subcontractors' Association).

<sup>137</sup> Pub. L. No. 104-106, § 4104(a)(8). ADR should be a viable alternative for many contractors. In 1990 Congress enacted the Civil Justice Reform Act (28 U.S.C. §§ 471, 473(a)(6), 479(b), 479(c)(3) (1994)) which began a comprehensive ADR movement in Federal courts. The Act requires Federal courts to consider ADR use as part of each court's Expense and Delay Reduction Plan along with "facilitating deliberate adjudication of civil cases on the merits, monitoring discovery, improving litigation management, and ensuring just, speedy, and inexpensive resolutions of civil disputes." As of 1994, a survey of Federal judges indicated that over half authorized or used some form of ADR. In 1995, eighty of ninety-four Federal court districts authorized ADR use: forty districts and twelve Federal circuit courts have mediation programs while fourteen Federal courts have early neutral evaluation programs. While mediation had been called "the sleeping giant of business dispute resolution," the utilization of so much mediation in Federal courts and in the business docket during the 1990s helped demonstrate its merits and moved it to center stage in commercial disputes. A second statute, the Administrative Dispute Resolution Act (5 U.S.C. §§ 571-583 (1994)), serves to promote the growth of ADR among Federal government agencies. This statute requires Federal agencies to consider ADR use and thus spurred renewed interest in ADR for government cases, many of which involve contractors and private businesses. The Act was scheduled to expire on October 1, 1995 (Pub. L. No. 101-552, 11, 104 Stat. 2736 (1990)), but the FASA continued ADR authorization for disputes involving contracts with the Federal government (Pub. L. No. 103-355, 2352, 1994 U.S.C.C.A., 108 Stat. §3243, 3332, to be codified at 41 U.S.C. §605(e)). Finally, the Negotiated Rulemaking Act (5 U.S.C. 561-570 (1994)) promotes collaboration between Federal agencies and private parties in promulgating regulations. Because this process incorporates the opinions of interested parties in drafting rules, it improves the rules' substance and reduces the number of resulting lawsuits. Catherine Cronin-Harris, *Symposium on Business Dispute Resolution: ADR and Beyond: Mainstreaming: Systemizing Corporate Use of ADR*, 59 Alb. L. Rev. 847, 871-72 (1996) (footnotes omitted).

<sup>138</sup> Pub. L. No. 104-106, § 4001, 110 Stat. 186 at § 4105. The two phases are: First, evaluating the offeror's technical approach and technical qualifications, and, second, when the most highly qualified offerors have been selected, evaluating technical proposals and cost or price information. *Id.* at § 4105(c).

contracting officer expects offers to include only commercial items,<sup>140</sup> 6) directing that the Federal Acquisition Regulation (FAR) include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items,<sup>141</sup> particularly those provisions of law that “[impose] on persons who have been awarded contracts by the Federal Government for the procurement of commercially available off-the-shelf items Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services,”<sup>142</sup> 7) making cost accounting standards inapplicable to contracts and subcontracts for commercial items,<sup>143</sup>

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<sup>139</sup> *Id.* at § 4201.

<sup>140</sup> *Id.* at § 4202.

<sup>141</sup> *Id.* at § 4203. Notably excepted from this provision of FARA are the provisions related to small businesses and bid protest procedures. *Id.* at §4203(a)(3)(A) and §4203(a)(3)(B). Apparently there was a strong, albeit futile, pre-passage push to change both small business procedures (particularly the Small Business Administration’s ability to overrule a contracting officer’s determination of nonresponsibility) and bid protest procedures (particularly at the General Services Administration Board of Contract Appeals). With regard to the former, “We . . . need to eliminate the Small Business Administration’s (SBA) right to overrule a contracting officer’s determination that a small business should not be awarded a contract because it lacks certain elements of responsibility, such as competency, capability and capacity. . . . [W]e suggest that the SBA Certificate of Competency Program be eliminated.” *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, Office of Federal Procurement Policy, Office of Management and Budget). Concerning the latter, “Unless we stop allowing our [suppliers] to manage us by litigation, no reform—no matter how promising or empowering its design—will achieve the streamlining we need.” *Id.* Reform may never, in reality, be possible. Derek Schaaf, Deputy Inspector General, Department of Defense, testified before the House that, during an Acquisition Reform Senior Steering Group meeting, a copy of the FAR provision implementing the rules for commercial acquisition, defining what a commercial product or service is, was handed out. The proposed regulation, including comments from DoD, was over 200 pages of small, single-spaced print! *Id.* (statement of Derek Schaaf, Deputy Inspector General, Department of Defense).

<sup>142</sup> Pub. L. No. 104-106, § 4203(b), with exceptions for laws providing for criminal or civil penalties and laws that specifically refer to and override this section. *Id.*

<sup>143</sup> *Id.* at § 4205. The DoD Deputy Inspector General expressed his concern over this provision to the House:

I am . . . opposed to the proposed change . . . to provide a blanket waiver of cost accounting standards for any commercial acquisition. The cost accounting standards ensure consistency of accounting among contractors, as well as require that unallowable costs, such as lobbying, entertainment, etc., not be billed to the Government. In order to receive Government financing, the contractor must demonstrate that his accounting practices adequately assign costs to contracts. Therefore, I see no reason why contracts that provide for Government financing (progress payments) should not include the

8) eliminating certification requirements for standards for inventory accounting systems and drug-free workplace requirements,<sup>144</sup> 9) removing from the FAR certification requirements for contractors and offerors that are not *specifically imposed by statute*,<sup>145</sup> 10) prohibiting certification requirements from appearing in the FAR unless *specifically imposed by statute*,<sup>146</sup> 11) providing that “[a] provision of law may not be construed as requiring a certification by a contractor or offeror in a procurement made or to be made by the Federal Government unless that provision of law *specifically provides that such a certification shall be required*”<sup>147</sup> [emphasis added], 12) providing for various changes in procurement integrity provisions,<sup>148</sup> 13) adding provisions on value engineering,<sup>149</sup> and 14) adding provisions relating to the acquisition workforce.<sup>150</sup>

After FARA was passed, Congressman Spence commented on the future of acquisition reform and the vital role that the President and the Administration played in its implementation:

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provisions of the cost accounting standards. . . . The truth is that requesting cost and pricing data is a common commercial practice. Large companies that have purchasing leverage will generally make their suppliers provide cost and pricing data. Contractors who do business with the Government gripe about TINA [Truth in Negotiation Act] yet they will make their own suppliers show them exactly what a product costs to make before they buy it. If the large company detects they overpaid that supplier, the supplier will probably never get another contract. The Government cannot exercise a similar option to simply exclude a supplier.

*Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Derek Schaaf, Deputy Inspector General, DoD) discussing the Truth in Negotiation Act, 10 U.S.C. § 2306a.

<sup>144</sup> Pub. L. No. 104-106, at § 4301(a).

<sup>145</sup> *Id.* at § 4301(b) (emphasis added).

<sup>146</sup> *Id.* at § 4301(c) (emphasis added).

<sup>147</sup> *Id.* at § 4301(d) (emphasis added).

<sup>148</sup> *Id.* at § 4304.

<sup>149</sup> *Id.* at § 4306(a).

<sup>150</sup> *Id.* at § 4307.

In a span of two legislative years, Congress has enacted three major acquisition reform initiatives: the Federal Acquisition Streamlining Act of 1994, the Federal Acquisition Reform Act of 1996 and the Information Technology Management Reform Act of 1996. This assertive legislative effort reflects a recognition by the Congress of the urgent need to simplify, streamline and reduce the cost associated with the Federal acquisition process. The Committee on National Security and the Committee on Government Reform and Oversight, in particular, have aggressively pursued such reforms to maximize the return on each taxpayer dollar used to procure the billions in goods and services the Federal government procures annually. The committee strongly believes that **the burden for continuing this effort has now shifted to the executive branch** as it begins the lengthy and complex process of implementing the many statutory changes contained in the aforementioned legislation. The committee notes that this legislation, in general, intentionally refrained from prescriptive statutory direction in order to maximize flexibility and effective regulatory implementation. Therefore, the committee strongly urges the appropriate agencies of government to take maximum advantage of the flexibility and opportunity provided by this legislation during the process of developing and implementing the necessary regulations and guidance.<sup>151</sup> (emphasis added).

Despite the seemingly unequivocal commitment from the Clinton Administration to the goals of acquisition reform, the President has nevertheless thwarted these advanced with some of his environmental executive orders, particularly Executive Order 12,969. Before the conflicts between those executive orders and acquisition reform are addressed in Chapter Three, we must first examine the sources and history of the President's authority to issue executive orders. This analytical framework will allow the study in Chapter Four of whether the President has exceeded his power in the political hot spot of the environmental arena.

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<sup>151</sup> H.R. REP. NO. 563, 104<sup>th</sup> Cong. (1996) (citations to public laws omitted; emphasis added).



## CHAPTER TWO: HISTORY OF THE PRESIDENT'S AUTHORITY TO ISSUE EXECUTIVE ORDERS—A STUDY OF THE SEPARATION OF POWERS DOCTRINE

### A. In General

This section unfortunately cannot be divided in a neat, logical order. There are several sources of the President's power—namely the Constitution and statutory grants from Congress—but many of the several Supreme Court cases which have helped define that power do not fit neatly under any particular category. This section will first examine the sources of power, highlighting elements of the seminal case in the area, *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>152</sup> and will then discuss chronologically the several cases that have interpreted the extent of the President's power. This chapter begins by examining exactly what an executive order is.

Executive orders reflect the “ordinance-making powers of the President of the United States.”<sup>153</sup> One category of orders covers ceremonial-type activities like declaring Federal holidays.<sup>154</sup> The category at issue in this paper is an exercise of power via executive order that is tantamount to legislation, which some commentators claim is unconstitutional.<sup>155</sup>

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<sup>152</sup> 343 U.S. 579 (1952).

<sup>153</sup> Rodriguez, *supra*, note 8, at 510, quoting J. HART, THE ORDINANCE-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES (1970).

<sup>154</sup> Rodriguez, *supra*, note 8, at 510.

<sup>155</sup> *Id.* at 510-11, n 38.

Executive orders are also presidential policy directives to the Federal bureaucracy.<sup>156</sup> But, where there is no specific statutory grant of authority from Congress for the President to issue an executive order, many argue that the Order lacks the force and effect of law and is merely an executive "project."<sup>157</sup>

From early in our country's history, these potential constitutional barriers haven't stopped presidents from exercising legislative powers. For example, a *lawful* exercise of power delegated from Congress occurred when President Washington received the authority from Congress to issue a directive laying an embargo during a congressional recess. Washington was specifically authorized to issue orders for its enforcement.<sup>158</sup> On the other hand, a questionable exercise of power occurred when President Lincoln issued the Emancipation Proclamation, declaring slavery illegal.<sup>159</sup> Despite various historically significant exercises of power that we have now come to take for granted, repeated encroachments on Congressional authority by the President must not be left unchecked.

Powers of the Federal government are separated under a constitutionally mandated system of legislative, executive, and judicial branches.<sup>160</sup> "No one could imagine the president promulgating a new tax code, the Supreme Court nominating an ambassador to France, or Congress hearing appeals from the International Trade Court."<sup>161</sup> The separation of powers doctrine serves a useful descriptive function as a summary for the

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<sup>156</sup> Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 Duke L. J. 285, 286 (citations omitted).

<sup>157</sup> *Id.* at 301, citing *Stevens v. Carey*, 482 F.2d 188, 190-91 (7<sup>th</sup> Cir. 1973).

<sup>158</sup> Rodriguez, *supra*, note 8, at 511, citing J. HART, *THE ORDINANCE-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES* 52, 54-55 (1970).

<sup>159</sup> *Id.*

<sup>160</sup> U.S. CONST. art. I. art. II. and art. III.

<sup>161</sup> Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U.L. Rev. 109, 111 (1984).

many parts of our tripartite governmental system, but one commentator asserts that the doctrine is not, in itself, a separate analytical tool.<sup>162</sup> Professor Glennon believes the Supreme Court does not decide cases on the basis of the separation of powers doctrine alone, but rather decides them by referring to other traditional sources of relevant authority—the constitutional text, the intent of the Framers, or custom and practice. Professor Glennon claims that the essential task for the Court in separation of powers cases has been to discover which of the three sources of authority will govern.<sup>163</sup>

The issue becomes to what extent the President can, on his own, regulate conduct in circumstances which Congress could have authorized but specifically did not do so. The focus of this paper is obviously on the extent of the President's power to impose restrictions or conditions on Federal contractors, in the name of protecting the environment and the community's right-to-know, particularly in light of conflicting acquisition reform legislation. These restrictions include the "... presidential imposition of conditions upon those receiving government contracts when the conditions would be understood to have altered a commonly understood baseline of liberty."<sup>164</sup>

"The President's power, if any, to issue an order must stem either from an act of Congress or from the Constitution. . . ."<sup>165</sup> The focus of this inquiry into presidential power involves determining what activities are appropriate to legislatures, to executives, and to courts.<sup>166</sup> Most commentators seem to agree on these two clear and solid sources

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Henry P. Monaghan. *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 10 (1993). See, *supra* text accompanying note 376 for a discussion of a contractor's due process liberty interest.

<sup>165</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

<sup>166</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).

for the President's power to issue executive orders: the Constitution and individual statutes.<sup>167</sup> Some find a source of authority in "custom" or "prescription"—a congressional pattern of failure to reign in the President when he acts.<sup>168</sup> A smaller "some" stretch the limits of the constitution and find an inherent authority of the President to act.<sup>169</sup> Each of the above potential sources of power will be examined in detail in the sections that follow.

It merits mentioning that one author stretches the limits of the President's authority even one step further to find that another source of the President's power comes from the Presidential Oath or Affirmation to "... faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."<sup>170</sup> This authority also asserts that presidential power doesn't really come from any of these sources but rather lies in his power to persuade—his power as a politician.<sup>171</sup> The author of this paper asserts that President Clinton's power and motive in issuing Executive Order 12,969 is solely political.

*Youngstown Steel & Tube Co. v. Sawyer*<sup>172</sup> is the bedrock case defining presidential power. Although it is discussed more fully in the pages that follow, Justice Frankfurter, in his concurring opinion, gave a useful anecdotal description of the nature of power in the American system of government:

Before the cares of the White House were his own, President Harding is reported to have said that government after all is a very simple

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<sup>167</sup> See, e.g., Rodriguez, *supra*, note 8, at 511.

<sup>168</sup> See, e.g., Glennon, *supra*, note 161.

<sup>169</sup> See, e.g., Raven-Hansen, *supra*, note 156, at 303.

<sup>170</sup> Monaghan, *supra*, note 164, at 14, quoting U.S. CONST. art. II, §1, cl. 9.

<sup>171</sup> *Id.* at 2, quoting Richard E. Neustadt, *Presidential Power and the Modern Presidents* 37 (1990).

<sup>172</sup> 343 U.S. 579 (1952).

thing. He must have said that, if he said it, as a fleeting inhabitant of fairyland. The opposite is the truth. A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power. . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.<sup>173</sup>

What exactly are the limits of the President's powers? The following sections will explore this question in detail.

## **B. Constitutional Authority**

Nowhere in the Constitution is the power to issue executive orders directly set forth. However, it is here that the President's ability to act is at its most powerful point—when the President acts under the authority granted to him in the Constitution, “his lawmaking power extends to the point where it conflicts with congressional intent in a

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<sup>173</sup> *Id.* at 593-94 (Frankfurter, J., concurring).

specific field.”<sup>174</sup> There are three potential sources of presidential power in the Constitution: the “vested” clause, the “take Care” clause and a residual or inherent constitutional power. Each will be examined below.

### 1. The “Vested” Clause—President as Executive

The Constitution simply states that “[t]he executive Power shall be vested in a President of the United States of America. . . .”<sup>175</sup>

In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>176</sup> President Truman, to avert a nation-wide strike of steel workers which he believed would jeopardize national defense during the Korean conflict, issued an Executive Order<sup>177</sup> which directed the Secretary of Commerce to seize and operate most of the steel mills in the United States.<sup>178</sup> There was no statute that expressly authorized the President to take possession of property as he did.<sup>179</sup> Justice Black, writing the plurality opinion, found that the President’s authority, if any, had to be found in the Constitution.<sup>180</sup> In holding that none of the several constitutional provisions granting executive power authorized the President to seize the steel mills,<sup>181</sup> Justice Black wrote:

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.

**The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.** And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the

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<sup>174</sup> *Id.* at 636-38.

<sup>175</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>176</sup> 343 U.S. 579 (1952).

<sup>177</sup> Exec. Order No. 10,340, 16 Fed. Reg. 3503 (1952).

<sup>178</sup> 343 U.S. at 582.

<sup>179</sup> *Id.* at 585.

<sup>180</sup> *Id.* at 587.

<sup>181</sup> *Id.* at 589.

first article says that “All legislative Powers herein granted shall be vested in a Congress of the United States . . . .” After granting many powers to the Congress, Article I goes on to provide that Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>182</sup> (emphasis added).

Justice Jackson, in a separate concurring opinion, disputed the Government’s contention that the “vested” clause granted to the President “all the executive powers of which the Government is capable.”<sup>183</sup> He noted that the Framers delineated several specific, sometimes trifling, details of the President’s power which would certainly otherwise seem inherent in the Executive.<sup>184</sup> Since these specific powers were set forth in the Constitution, a broader, more general power could not be extracted from the “vested” clause.<sup>185</sup>

According to one author, *Youngstown Sheet & Tube Co. v. Sawyer*<sup>186</sup> failed to clearly define the boundaries of presidential power—it was a plurality with six separate concurrences.<sup>187</sup> But the plurality opinion of Justice Black and Justice Jackson’s concurring opinion are cited most frequently and best articulate the debate on the scope of presidential power.<sup>188</sup> That debate continues under the “take Care” clause.

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<sup>182</sup> *Id.* (emphasis added) (footnotes omitted).

<sup>183</sup> *Id.* at 640-41.

<sup>184</sup> *Id.* and n 9 (power to require department heads to opine on any subject relating to their duties: power to commission all Officers of the United States).

<sup>185</sup> *Id.*

<sup>186</sup> 343 U.S. 579 (1952).

<sup>187</sup> Rodriguez, *supra* note 8, at 531.

<sup>188</sup> *Id.*

## 2. The “take Care” Clause<sup>189</sup>

Article II, Section 3, states: “. . . [the President] shall take Care that the Laws be faithfully executed . . .”

At least one member of the Supreme Court believes that the President’s **only** power is that to “take Care:”

If the division of Federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature **was understood when the Constitution was enacted**. The Executive, for example, in addition to “tak[ing] Care that the Laws be faithfully executed,” . . . has **no power to bind private conduct in areas not specifically committed to his control by Constitution or statute**; such a perception of “[t]he Executive power” may be familiar to other legal systems, but is alien to our own.<sup>190</sup> (emphasis added).

The “take Care” clause was one of the bases for President Truman’s alleged authority to seize the steel mills articulated by the Solicitor General in *Youngstown Steel & Tube Co. v. Sawyer*.<sup>191</sup> Justice Jackson, however, in his concurring opinion, believed that the power under the “take Care” clause was necessarily and profoundly restricted by the proscription of the Fifth Amendment that “No person shall be . . . deprived of life, liberty or property, without due process of law . . . .”<sup>192</sup> He felt that the “take Care” clause “gives a government authority that reaches so far as there is law;”<sup>193</sup> yet the Fifth Amendment “gives a private right that authority shall go no farther.”<sup>194</sup>

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<sup>189</sup> U.S. CONST. art. II, § 3.

<sup>190</sup> *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2450 (1991) (Scalia, J., concurring) (finding that double excise tax on out-of-state alcohol and distilled spirits violated Commerce Clause applied retroactively) (emphasis added).

<sup>191</sup> 343 U.S. 579, 646 (Jackson, J., concurring).

<sup>192</sup> *Id.*, citing, U.S. CONST. amend. XV.

<sup>193</sup> 343 U.S. at 646.

<sup>194</sup> *Id.*



Although the Fifth Amendment due process clause is not a focus of this paper, Justice Jackson's comments illustrate the conflicts within the Constitution itself, let alone among statutes, over the separation of powers within the three branches of government.

A more contemporary application of the usage of the "take Care" clause as authority for Presidential action occurred in the early 1980's when President Reagan issued Executive Order 12,291<sup>195</sup> (requiring a complicated review process for agencies to ensure benefits exceed costs before issuing new regulations) under the "take Care" authority.<sup>196</sup> Although the Preamble cited the authority for the order as the Constitution and laws of the United States, it did not cite either a specific constitutional provision or a statute that authorized the President to implement such a program. Before promulgating the executive order, the Department of Justice had issued a legal memorandum relying on the power in the "take Care" clause and the interpretation of that power in another Supreme Court case, *Myers v. United States*,<sup>197</sup> and the dissent in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>198</sup> for the source of the President's authority.<sup>199</sup> The Justice Department construed this "take Care" power as a general coordinating function of the President to the extent the Chief Executive is suited uniquely as the representative of the nation as a whole to promote the broad *public interest* in the execution of laws.<sup>200</sup>

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<sup>195</sup> See notes 14-22, *supra* and accompanying text.

<sup>196</sup> Rodriguez, *supra*, note 8, at 515.

<sup>197</sup> 272 U.S. 52 (1926); see note 273, *infra*, and accompanying text.

<sup>198</sup> 343 U.S. 579, 687 (1952) (Vinson, C.J., dissenting).

<sup>199</sup> Rodriguez, *supra* note 8, at 515.

<sup>200</sup> *Id.*

Justice Frankfurter, however, in his concurring opinion in *Youngstown Sheet & Tube Co.*,<sup>201</sup> specifically rejected the notion that public interest should prevail:

... [The Government argues] that overriding public interest prevents the issuance of the injunction despite the illegality of the seizure. I cannot accept that contention. "Balancing the equities" when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.<sup>202</sup>

The Justice Department's memorandum on Executive Order 12,291 further asserted that the President was free to act unless Congress affirmatively limited the Executive. "[O]n matters of both procedure and substance, the President presumptively possesses the power to supervise rulemaking, unless Congress seeks to delimit that power affirmatively."<sup>203</sup> The Justice Department believed the "general administrative control" established by *Myers v. United States*<sup>204</sup> should be construed broadly to include other unspecified supervisory powers as well as the removal power.<sup>205</sup> This enables the President to consult with agencies possessing statutory decision-making power and require them to consider matters that the President deems relevant and appropriate.<sup>206</sup> The President as a consequence "posses constitutional authority to act beyond that which is accorded to him either implicitly in statutes or explicitly in the Constitution."<sup>207</sup>

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<sup>201</sup> 343 U.S. 579.

<sup>202</sup> *Id.* at 609-10.

<sup>203</sup> Rodriguez, *supra*, note 8, at 516.

<sup>204</sup> 272 U.S. 52 (1926).

<sup>205</sup> Rodriguez, *supra*, note 8, at 516.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

Although several Federal cases discussed an agency's failure to comply with Executive Order 12,291, no case actually questioned whether it was a valid exercise of Presidential power by President Reagan. This may be so because courts normally refuse to enforce executive orders when individuals bring suit alleging injury based on agency noncompliance.<sup>208</sup> The validity of executive orders may also be seldom tested in court because agencies themselves are the primary parties which must bear the burden of compliance, and the cost of compliance to private citizens is minuscule or too difficult to trace to the executive order. But with accounting systems and databases becoming more automated and capable, it should not be long before government contractors will be able to pinpoint costs associated directly with compliance to executive order mandates,<sup>209</sup> and then jurisdictional standing based on harm will follow.

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<sup>208</sup> *Raven-Hansen, supra*, note 156, at 287. *See, e.g., Michigan v. Thomas*, 805 F.2d 176, 187 (6<sup>th</sup> Cir. 1986):

Section 9 of Executive Order 12,291 states in relevant part that 'this Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.' Given this clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review, we hold that the Order provides no basis for rejecting the EPA's final action.

*Id.* *See also*, Guidance Implementing Executive Order 12969: Federal Acquisition: Community Right-To-Know; Toxic Chemical Release Reporting, 60 Fed. Reg. 50,738 (1995):

Executive Order 12969 does not create additional rights or benefits for private parties and does not allow for private rights of action to ensure agency compliance. While E.O. 12969 provides other mechanisms for compliance, the right to sue a Federal agency for failure to appropriately include the certifications required by E.O. 12969 in contract solicitations is not one of them. However, E.O. 12969 in no manner undermines any opportunity provided by EPCRA [Emergency Planning and Community Right-To-Know Act] . . . or PPA [Pollution Prevention Act] . . . to bring an action against a Federal contractor or its facilities and subcontractors otherwise required to report for failure to comply with the reporting requirements of EPCRA . . . or PPA.

*Id.*

<sup>209</sup> The government seems to have a good handle on the cost of regulation. Shortly after his inauguration in 1981, before a joint session of Congress, President Ronald Reagan identified the costs Federal regulations impose on government and industry as one of the major causes of the nation's economic woes. In that presentation, he quoted estimates that regulatory costs would ultimately reach nearly 100 billion

Even though courts may not grant private relief for an agency's failure to comply, executive orders become a part of an agency's rules. As such, they have the force and effect of law and bind an agency: 1) as a part of its obligation to follow its own rules and 2) as a matter of administrative due process.<sup>210</sup>

Whether the President claims his power from an explicit clause in the Constitution or not, an agency must comply. An even more troublesome situation exists in the area discussed next—residual constitutional authority.

### **3. Residual Constitutional Authority—The “Zone of Twilight”**

Can the President act when there is no specific expression or denial of constitutional authority or Congressional approval for his actions?

Justice Jackson, in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, described the President's residual constitutional power as follows:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed power into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.<sup>211</sup>

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dollars. Rodriguez, *supra* note 8, at 505, *citing* Program for Economic Recovery: Address Before Joint Session of Congress. 17 WEEKLY COMP. PRES. DOC. 130, 136 (Feb. 18, 1981).

<sup>210</sup> Raven-Hansen, *supra*, note 156, at 296-97. Another author describes it this way: “Rather than produce goods or services for sale, [Federal agencies] are organized and managed to respond to constitutional and congressional direction (statutes) and are bound to comply with their own regulations developed after public review and comment.” Hourclé, *supra*, note 26 at 2, *citing* The Administrative Procedure Act, 5 U.S.C. § 501.

<sup>211</sup> *Youngstown Steel*, 343 U.S. at 635 (Jackson, J., concurring).

Justice Jackson set out three groupings of situations under which the President may claim authority to act. First is action pursuant to express or implied authorization of Congress.<sup>212</sup> Justice Jackson wrote that in this situation, the President's authority was at its maximum, "for it includes all that he possesses in his own right plus all that Congress can delegate."<sup>213</sup> Second is action without either a congressional grant or denial of authority.<sup>214</sup> In this second "residual" area, the President can rely on his own independent, constitutional powers as well as on the authority in what Justice Jackson called the "zone of twilight"—where the President and Congress "may have concurrent authority, or in which its distribution is uncertain."<sup>215</sup> In the zone of twilight, Congressional inertia, indifference or acquiescence, Justice Jackson continued, "may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>216</sup> Third and finally, Justice Jackson grouped together actions incompatible with the expressed or implied will of Congress.<sup>217</sup> According to Justice Jackson, in this last grouping the President's power is "at its lowest ebb, for he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>218</sup> He placed President Truman's

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* (footnote omitted).

<sup>214</sup> *Id.* at 637.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (footnote omitted).

<sup>217</sup> *Id.* at 637.

<sup>218</sup> *Id.* at 637-38.

actions of trying to nationalize the steel industry during the Korean conflict in this third “low ebb” category.<sup>219</sup>

Justice Jackson did find, however, that the President possessed more than just express constitutional and delegated powers. Rather,

[t]he purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I . . . give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.<sup>220</sup>

Where statutes neither specifically authorize nor prohibit the content of an executive order, the President’s authority for issuing an order can still come from one of two sources in this “twilight zone”<sup>221</sup> of concurrent authority: congressional acquiescence in an established executive practice (custom), or independent executive authority standing alone.<sup>222</sup> One commentator argues that the latter, independent executive authority, only contains the President’s intrinsic *non-legislative* authority to manage and guide the executive branch—a function which only allows rules related to procedures, internal organization, and housekeeping matters.<sup>223</sup> It does seem appropriate, however, that the President has more power to establish rules for the Executive Branch after the required

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<sup>219</sup> *Id.* at 640.

<sup>220</sup> *Id.*

<sup>221</sup> Raven-Hansen, *supra*, note 156, at 303, *citing* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>222</sup> *Id.*, *citing* *In re Neagle*, 135 U.S. 1 (1890).

<sup>223</sup> Raven-Hansen, *supra*, note 156, at 311. This creates a Catch-22 for the agency, however, because, although not bound as a matter of law by such an executive order, the agency must still comply because it is required to abide by its own rules. *Id.*

cost/benefit review, as long as otherwise not prohibited. Legislating what the *private* sector must do is a function entirely within the powers of Congress.

While explicit justification for every presidential step is not required,

. . . the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.<sup>224</sup>

While the President's constitutional authority to act is securely based, even more potentially powerful is authority directly delegated to the President by Congress. This is so particularly when the President exercises legislative-type authority. This area will be discussed next.

### C. Congressional Delegation by Statute

Although Congress' power to delegate to the President is expansive, it is still not without limits. When Congress delegates by statute the power to issue executive orders:

. . . [it] vests its own constitutional grant of authority in the President. To this extent, it can neither exceed its own constitutional grant of authority, nor can it grant the President power in excess of his constitutional authority. It is thus not within the power of Congress to grant the President legislative powers without including limits for the exercise of that power.<sup>225</sup>

Specific grants of power are abundant. Many statutes state that agencies may make such rules and regulations as are necessary to carry out the particular legislation so

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<sup>224</sup> Monaghan, *supra*, note 164, at 40, *quoting* William Howard Taft, Our Chief Magistrate and His Powers 139-40 (1916).

<sup>225</sup> Rodriguez, *supra* note 8, at 511, *citing*, A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 530 (1934).

long as they are reasonably related to the purposes of the enabling statute.<sup>226</sup> This situation embodies the near perfect, or at least most literal, example of our tripartite system—Congress legislates and gives the President the direction to execute. A more troubling situation arises when statutory purposes conflict. These collateral expressions of intent are mentioned next.

#### **D. Collateral Expressions of Congressional Intent**

As monumental a task as it may be, the President must look beyond the statute under which he claims authority before crafting an Executive Order.<sup>227</sup> An executive prerogative, such as the contracting details of President Clinton's stated desire to improve the public's right-to-know about toxic releases into the environment in Executive Order 12,969, may conflict with a much broader congressional purpose, such as federal acquisition streamlining and reform. Although FARA, which specifically prohibits additional certifications and contract clauses, was passed *after* Executive order 12,969, FASA had been in effect for nearly a year. The Administration's courtship and loving embrace of FASA and FARA<sup>228</sup> turned into a cold shoulder with the certification requirements of Executive Order 12,969.

One author suggests that a closer look at collateral expressions of congressional intent in other statutes is appropriate in establishing the nexus between the Executive

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<sup>226</sup> Monaghan, *supra*, note 164, at 42, *citing* *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973).

<sup>227</sup> Egerton, *supra* note 12, at 224.

<sup>228</sup> See note 123, *supra*, and accompanying text.



Order in question and the delegation of the requisite legislative authority from Congress.<sup>229</sup>

Finally, some authorities claim a source of presidential power in customary executive practices left untouched by Congress.

### **E. Custom or Prescription**

Custom or prescription, sometimes referred to as nebulous “inherent” power,<sup>230</sup> is another method of validating the President’s actions in an executive order. This power can be valid, if used properly, because “. . . unchallenged executive actions create a presumption of legislative authority, and . . . such a presumption serves the need for continuity and stability in the proper administration of laws.”<sup>231</sup> In *Youngstown Sheet and Tube v. Sawyer*,<sup>232</sup> Justice Jackson described reliance on this theory, particularly when justifying presidential power to deal with a crisis or an emergency according to the necessities of the case, as containing an “unarticulated assumption . . . that necessity knows no law.”<sup>233</sup> He continued that loose and irresponsible use of adjectives (like “inherent,” “implied,” “incidental” and “plenary”), however, colors all nonlegal and much legal discussion of presidential powers.<sup>234</sup> Words such as these come to have no fixed or ascertainable meanings.<sup>235</sup>

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<sup>229</sup> Egerton, *supra*, note 12, at 224.

<sup>230</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

<sup>231</sup> *United States v. Midwest Oil*, 236 U.S. 459, 473 (1915).

<sup>232</sup> 343 U.S. 579 (1952).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 646-47.

<sup>235</sup> *Id.*

In tandem with Justice Jackson's views on customary practice, Justice Frankfurter believed that

[t]he powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government. To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercises of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.<sup>236</sup>

In his concurring opinion in *Youngstown Steel & Tube Co. v. Sawyer*,<sup>237</sup> Justice Frankfurter highlighted by clear example why Congress did not acquiesce in President Truman's attempt to nationalize the steel mills:

Congress has frequently—at least 16 times since 1916—specifically provided for executive seizure of production, transportation, communications, or storage facilities. In every case it has qualified this grant of power with limitations and safeguards. This body of enactments . . . demonstrates that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed whenever the President was vested with this extraordinary authority.<sup>238</sup>

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<sup>236</sup> *Id.* at 610-11 (emphasis added).

<sup>237</sup> 343 U.S. 579 (1952).

<sup>238</sup> *Id.* at 597-98.

In only one case, *United States v. Midwest Oil*,<sup>239</sup> has the Supreme Court upheld presidential law-making which appeared to be contrary to the terms of an Act of Congress. The Court recognized the existence of *some* presidential authority to burden private rights absent direct statutory authority.<sup>240</sup>

In *Midwest Oil*, Congress had provided that certain government lands containing mineral oils be open to purchase by United States citizens for a nominal amount. Some oil lands were being depleted so rapidly that governmental ownership would last only a few months. Afraid that its own oil needs would soon require the government to buy back at market prices the very oil it was giving away, the Secretary of the Interior recommended suspension of further purchases of these lands by citizens. While acknowledging doubt about his authority, President Taft nevertheless temporarily withdrew some of the California and Wyoming lands in reliance that Congress would pass legislation authorizing him to do so. The withdrawal order was challenged as contrary to the terms of the access statute.<sup>241</sup>

The Supreme Court held that President had the power to temporarily withdraw the lands, despite Congress' express statement in opposition.<sup>242</sup> The Court stated:

It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a

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<sup>239</sup> 236 U.S. 459 (1915).

<sup>240</sup> Monaghan, *supra* note 164, at 44.

<sup>241</sup> *Id.* at 44-45.

<sup>242</sup> 236 U.S. at 483.

power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.<sup>243</sup>

The *Midwest Oil* Court further explained that the Executive cannot by his own course of action *create* a power. But this long-continued practice of withdrawals of public lands, known to and acquiesced in by Congress, raised a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands.<sup>244</sup>

One commentator considers *Midwest Oil* to support several different propositions.<sup>245</sup> First, the opinion could be limited to nothing more than a fact-specific delegation case—with the President's construction of the access statute reasonable because of a long-standing administrative practice.<sup>246</sup> Second, *Midwest Oil* could also confine the President's regulatory power to that necessarily incident to the President's role as chief administrator in connection with Federal public lands.<sup>247</sup> Finally, the decision can be understood to sanction presidential conduct invading private rights (to purchase federal lands) if this conduct is supported by congressional acquiescence or tacit consent.<sup>248</sup> The question then becomes what congressional conduct suffices for that purpose. Congressional inaction is not enough: *Midwest Oil* requires that "adjacent" congressional legislation must presume the validity of a *prior* presidential practice.<sup>249</sup> This last

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<sup>243</sup> *Id.* at 472-73.

<sup>244</sup> *Id.* at 474.

<sup>245</sup> Monaghan, *supra*, note 164, at 45-47.

<sup>246</sup> *Id.* at 45.

<sup>247</sup> *Id.* at 46.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 46-47.

interpretation seems most reasonable, and, under this interpretation, *Midwest Oil* does not strain the theory that the President must possess statutory authority in order to act.<sup>250</sup>

*Midwest Oil* doesn't restrict the sound holding of the later case, *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>251</sup> Justice Frankfurter distinguished *Midwest Oil* from *Youngstown Sheet & Tube Co.* in his concurring opinion in the latter.<sup>252</sup> He described *Midwest Oil* as involving "authority not explicitly conferred yet authorized to be exercised by the President" and *Youngstown Sheet & Tube Co.* as involving "the denial of such authority."<sup>253</sup>

In *Midwest Oil*, Presidents had temporarily withdrawn lands in 252 instances over a period of 80 years.<sup>254</sup> *Youngstown Sheet & Tube Co.* involved only three prior comparable instances of the exercise of presidential power vis a vis seizure.<sup>255</sup> "[T]hese three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution revealed in the *Midwest Oil* case."<sup>256</sup>

In *AFL-CIO v. Kahn*,<sup>257</sup> (a much more recent case, discussed in greater detail in the next section), the Court of Appeals for the District of Columbia spoke of congressional acquiescence: "[T]he President's view of his own authority under a statute

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<sup>250</sup> *Id.* at 47 (footnotes omitted).

<sup>251</sup> 343 U.S. 579 (1952).

<sup>252</sup> 343 U.S. at 611 (Frankfurter, J., concurring).

<sup>253</sup> *Id.*

<sup>254</sup> 343 U.S. at 611 (Frankfurter, J., concurring).

<sup>255</sup> *Id.* at 613.

<sup>256</sup> *Id.*

<sup>257</sup> 618 F.2d 784, 790 (1979), *cert. denied*, 99 S. Ct. 3107 (1979).

is not controlling, but when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect.'"<sup>258</sup>

Custom again played a role in the "Pocket Veto Case."<sup>259</sup> At issue was the president's power to veto legislation presented to him within ten days of an adjournment of Congress, without returning the bill to Congress for an "override" vote. The Pocket Veto Case established the president's authority to veto legislation without returning it when Congress was in an *intersession* recess.<sup>260</sup> Although the Court's holding was based on its interpretation of the Constitution, it also noted that its construction of the provision in question was shaped by the practical understanding that had been given to it by the Presidents through a long course of years and in which Congress had acquiesced.<sup>261</sup>

There are several advantages and disadvantages to an analysis of Presidential power based on custom or prescription. One author described the positive aspects as recognizing the Framers' inability to divine all of the exigencies to be confronted by our government in an unforeseen future—recognizing constitutional law as a process.<sup>262</sup> Obvious problems with this approach, however, are that it equates "what is" with "what ought to be," and patterns of practice become principles of law.<sup>263</sup> In addition, the use of custom requires courts to make findings of historical facts, "often by relying on sources every bit as obscure as those used to divine the Framers' intent."<sup>264</sup>

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<sup>258</sup> *Id.* citing Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978).

<sup>259</sup> Glennon, *supra*, note 161, at 116, citing Indian Tribes of Washington v. United States, 279 U.S. 655, 690 (1929).

<sup>260</sup> 279 U.S. at 678-81.

<sup>261</sup> Glennon, *supra*, note 161, at 116.

<sup>262</sup> *Id.* at 121.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 126.

Clearly, congressional apathy toward a President's actions can strengthen their validity, especially if exercised on numerous occasions over a long period of time. In addition to *Youngstown Sheet & Tube Co.* and *Midwest Oil*, several other Supreme Court cases through the years have defined the limits of presidential power.

#### F. Additional Supreme Court Cases

*In re Neagle*<sup>265</sup> first established the legal power of the President's quasi-legislative acts.<sup>266</sup> In *Neagle*, an officer who was ordered to be a bodyguard to Supreme Court Justice Stephen J. Field killed David Terry, a man who had threatened Justice Field's life, because he believed Terry was about to attempt to kill Justice Field on a train to California.<sup>267</sup> Neagle was taken into custody, charged with murder under state law and then released on a writ of habeas corpus.<sup>268</sup> The arresting sheriff challenged the writ of habeas corpus, but the writ was upheld by the Supreme Court.<sup>269</sup> The Court held that "any obligation fairly and properly inferable from the Constitution, or any duty of a United States officer is to be deemed a law" within the meaning of a Federal statute authorizing circuit courts to grant writs of habeas corpus to persons in custody for acts committed pursuant to the *laws* of the United States.<sup>270</sup> The attorney general's order that Neagle protect Justice Field was such a law, and even though it was not directly authorized by the legislature, the Court found it was authorized by the "take Care" clause.<sup>271</sup> The Court reasoned that the attorney general was an officer whose power originated from his

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<sup>265</sup> 135 U.S. 1 (1890).

<sup>266</sup> *Id.* at 58-59.

<sup>267</sup> *Id.* at 44-53.

<sup>268</sup> *Id.* at 3-4, 53.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 58, citing Rev. Stat. U.S. § 753.

appointment by the President, and he therefore possessed authority to act in the stead of the President.<sup>272</sup>

In *Myers v. United States*,<sup>273</sup> the Supreme Court found that the President's power to remove Federal officers was incident to his power to appoint them.<sup>274</sup> Myers had been appointed first class postmaster in Portland, Oregon. In 1920, the Postmaster General requested Myers' resignation, and, when Myers refused, the Postmaster General removed him at the President's direction.<sup>275</sup> Myers' successors sued the Postmaster General, claiming that the President could not order his removal without the consent of the Senate.<sup>276</sup> The Court found that no express provision in the constitutional text addressed the issue.<sup>277</sup> When the constitutional text is not dispositive, the Court frequently turns to other sources of authority, including the Framers' intent.<sup>278</sup> It held here that the statute requiring Senate consent was invalid based on the Framers' intent as inferred from the First Congress. The Court found the removal power implicit in the "take Care" clause as "general administrative control" and upheld the removal.<sup>279</sup> Of importance is that the First Congress expressly granted the President the sole removal power over officers in the executive departments.<sup>280</sup> This was constitutionally significant because many members of that First Congress were among the Framers of the Constitution.<sup>281</sup>

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<sup>271</sup> *Id.* at 63-64.

<sup>272</sup> *Id.*

<sup>273</sup> 272 U.S. 52 (1926).

<sup>274</sup> *Id.* at 118.

<sup>275</sup> *Id.* at 106.

<sup>276</sup> *Id.* at 107.

<sup>277</sup> *Id.* at 134-35.

<sup>278</sup> *Id.* 114-15.

<sup>279</sup> *Id.* at 134-35.

<sup>280</sup> Glennon, *supra*, note 161, at 114, n 31.

<sup>281</sup> *Id.*



*Humphrey's Executor v. United States*<sup>282</sup> limited the President's removal power under *Myers* by differentiating the supervisory power over independent regulatory agencies, which are comparatively insulated from presidential interference, from that over non-independent agencies, whose heads may be removed from office by the President for any reason. President Roosevelt ordered the removal of a member of the Federal Trade Commission, an agency not directly under the executive branch's control.<sup>283</sup> The Supreme Court refused to extend the removal power recognized in *Myers v. United States*,<sup>284</sup> distinguishing the situations by the fact that the office of the Postmaster General was a unit of the executive branch, subject to its power, whereas the nature of the Federal Trade Commission made it essential to be free from executive control.<sup>285</sup> The Court further stated it was unclear what power the President had when an agency was neither purely executive nor purely independent.<sup>286</sup> One commentator asserts that this lack of clarity "may mean that agencies with greater expertise should be treated as more independent from presidential control."<sup>287</sup>

*A.L.A. Schechter Poultry Co. v. United States*<sup>288</sup> discussed the degree of legislative authority Congress can delegate to the Executive and established that Congress cannot grant such power in an unrestricted manner.<sup>289</sup> The National Industrial Recovery Act

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<sup>282</sup> 295 U.S. 602 (1935).

<sup>283</sup> *Id.* at 618.

<sup>284</sup> 272 U.S. 52 (1926).

<sup>285</sup> 295 U.S. 602, 626-28.

<sup>286</sup> *Id.* at 631-32. "To the extent that between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise." *Id.*

<sup>287</sup> Rodriguez, *supra* note 8, at 529-530.

<sup>288</sup> 295 U.S. 495 (1935).

<sup>289</sup> *Id.* at 537.

(NIRA)<sup>290</sup> allowed the President to approve “codes of fair competition” for individual trades or industries.<sup>291</sup> The only restrictions on the codes were that they could not place inequitable restrictions on membership or operate to create monopolies or restrict small business.<sup>292</sup> Pursuant to the Act, the President issued the Live Poultry Code in the New York City area.<sup>293</sup> The Schechter’s, who operated poultry slaughterhouse markets in the New York City area, sought to have overturned their conviction on eighteen violations of the Live Poultry Code.<sup>294</sup> They argued that the NIRA was an unconstitutional “overdelegation” of power to the President.<sup>295</sup> The Supreme Court agreed the conviction should be overturned, stating that Congress could not delegate unfettered discretion to the President to “make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or business or industry.”<sup>296</sup>

Two recent Supreme Court cases, neither one dealing with executive orders but with executive powers of a different nature, illustrate the Court’s continued reliance on the doctrines established in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>297</sup> In *Loving v. United States*,<sup>298</sup> a military justice case, the Supreme Court relied on *Youngstown* in holding that the separation of powers doctrine was not violated when the President, rather than

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<sup>290</sup> 48 Stat. 195 (1933), as amended by 70 Stat. 384 (1956).

<sup>291</sup> *Id.* § 3.

<sup>292</sup> *Id.*

<sup>293</sup> 295 U.S. at 523.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 537-38. Although not the subject of this paper, several of President Clinton’s environmental executive orders seek to create new markets or stimulate the economy in the area of environmentally preferable products. See Exec. Order No. 12,873, [Federal Acquisition, Recycling, and Waste Prevention], 58 Fed. Reg. 54,911 (1993), as amended by Exec. Order No. 12,995, 61 Fed. Reg. 13,645 (1996). The holding in *Schechter Poultry* would seem to invalidate this order.

<sup>297</sup> 343 U.S. 579 (1952).

<sup>298</sup> 1996 U.S. LEXIS 3593, 64 U.S.L.W. 4390 (June 3, 1996).

Congress, prescribed the aggravating factors for imposition of the death penalty required by the Eighth Amendment in a felony murder case.<sup>299</sup>

In *Dalton v. Specter*,<sup>300</sup> the respondents sought to enjoin the Secretary of Defense from carrying out the President's decision to close the Philadelphia Naval Shipyard because the President allegedly violated the Defense Base Closure and Realignment Act of 1990<sup>301</sup> by accepting procedurally flawed recommendations.<sup>302</sup> In holding that the President's decision was within his authority, Justice Rehnquist wrote for the majority that *Youngstown* involved the conceded absence of statutory authority, not a claim that the President acted in excess of such authority as was claimed in *Dalton*.<sup>303</sup> The Court summarized its findings as follows:

In sum, we hold that the actions of the Secretary and the Commission cannot be reviewed under the [Administrative Procedure Act (APA)] because they are not "final agency actions." The actions of the President cannot be reviewed under the APA because the President is not an "agency" under that Act. The claim that the President exceeded his authority under the [Defense Base Closure and Realignment Act of 1990] is not a constitutional claim, but a statutory one. Where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.<sup>304</sup>

Another line of cases established a nexus test for linking presidential action to congressionally delegated authority.

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<sup>299</sup> *Id.* at 15-16.

<sup>300</sup> 114 S. Ct. 1719, 1994 U.S. LEXIS 3778, 128 L. Ed. 2d 497 (1994).

<sup>301</sup> 104 Stat. 1808, *as amended*, note following 10 U.S.C. § 2687 (1988 ed., Supp. IV).

<sup>302</sup> 114 S. Ct. 1719, at LEXIS 5, 24.

<sup>303</sup> *Id.* at LEXIS 21-22.

<sup>304</sup> *Id.* at LEXIS 28.

### The Nexus Test.

In *Chrysler Corp. v. Brown*<sup>305</sup> the Supreme Court found that for a regulation, issued pursuant to a statute and upon the direction of an Executive Order, to have the force and effect of law, "it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress."<sup>306</sup> Here, President Jimmy Carter's Executive Order 11,246<sup>307</sup> and President Johnson's Executive Order 11,375<sup>308</sup> directed the Secretary of Labor to make certain disclosures pursuant to the Freedom of Information Act (FOIA)<sup>309</sup> regarding employment of women and minorities.<sup>310</sup> Chrysler argued that the Trade Secrets Act,<sup>311</sup> which prohibits disclosure by government agents of secrets not "authorized by law," barred disclosure of such information."<sup>312</sup> The Court found no nexus. Neither the policies in the FOIA nor those in other statutes<sup>313</sup> purporting to allow the executive order authorized such disclosure.<sup>314</sup> *Chrysler Corp. v. Brown* expressly left open the question of "whether Executive Order 11,246 . . . is authorized by [the various statutory authorities] or some more general notion that the

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<sup>305</sup> 441 U.S. 281 (1979).

<sup>306</sup> *Id.* at 304.

<sup>307</sup> 3 C.F.R. 339 (1964 -1965 Comp.), as amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Comp.).

<sup>308</sup> 3 C.F.R. 684 (1966-1970 Comp.).

<sup>309</sup> July 4, 1966, P.L. 89-487, 80 Stat. 250 (see 5 U.S.C.S. § 552) as amended by Act of June 5, 1967, P.L. 90-23, 81 Stat. 54. (see 5 U.S.C.S. § 552) and Act of Nov. 21, 1974, P.L. 93-502, 88 Stat. 1561, 5 U.S.C.S § 552.

<sup>310</sup> 441 U.S. at 304.

<sup>311</sup> 18 U.S.C. § 1905.

<sup>312</sup> 441 U.S. at 304; 18 U.S.C. § 1905.

<sup>313</sup> Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-514 (1976); Titles VI and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000d to 2000d-4, 2000e to 2000e-17; the Equal Employment Opportunity Act of 1972, 5 USCS §§ 5108, 5314, 5315, 5316; 42 USCS §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13--2000e-17.

<sup>314</sup> 441 U.S. at 304-05.

Executive can impose reasonable contractual requirements in the exercise of its procurement authority.”<sup>315</sup>

### The “Sufficiently Close Nexus” Test

A 1979 decision in the District of Columbia Circuit, *AFL-CIO v. Kahn*,<sup>316</sup> attempted to water-down the *Chrysler Corp.*<sup>317</sup> nexus test, holding that Presidential actions merely required meeting a “sufficiently close nexus” test as the condition for validity of an executive order.<sup>318</sup> A 1981 decision in the Fourth Circuit, *Liberty Mut. Ins. Co. v. Friedman*,<sup>319</sup> however, strengthened *Chrysler Corp.* by holding that the President is not allowed to carry out presidential policies via enactments without congressional blessing, even if important national priorities are at stake.<sup>320</sup> Certiorari was denied in *AFL-CIO v. Kahn*, and the Supreme Court does not discuss the holdings of either case in its subsequent opinions. Although their precedential value is tenuous outside their individual circuits, a discussion of each, particularly *AFL-CIO v. Kahn*, is in order because of the large number of actions of this type brought in the District of Columbia Circuit.

In *AFL-CIO v. Kahn*,<sup>321</sup> President Carter issued Executive Order 12,092,<sup>322</sup> which directed the Council on Wage and Price Stability<sup>323</sup> to set “voluntary wage and price

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<sup>315</sup> Egerton, *supra* note 12, at 225, citing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 22, *AFL-CIO v. Kahn*, No. 79-1564 (D.C. Cir. June 22, 1979) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304-06 (1979)) (footnotes omitted), *cert. denied*, 99 S. Ct. 3107 (1979).

<sup>316</sup> 618 F.2d 784 (D.C. Cir. 1979).

<sup>317</sup> 441 U.S. 281.

<sup>318</sup> 618 F.2d at 792.

<sup>319</sup> 639 F.2d 164 (4<sup>th</sup> Cir. 1981).

<sup>320</sup> *Id.* at 171.

<sup>321</sup> 618 F.2d 784 (D.C. Cir. 1979).

<sup>322</sup> 43 Fed. Reg. 51375 (1978).

<sup>323</sup> The Council was established in 1974 to monitor inflationary wage and price developments in the private sector of the economy and the inflationary impact of Federal government programs and policies.

standards for the nation's economy"<sup>324</sup> to "encourage noninflationary pay and price behavior by private industry and labor, and to provide for the procurement by Executive agencies and Military Departments of personal property and services at prices and wage rates which are noninflationary. . . ."<sup>325</sup> The chairman of the Council on Wage and Price Stability was directed to "monitor company compliance, promulgate regulations and procedures, provide for appropriate exemptions and exceptions, and publish the name of noncomplying individuals or companies."<sup>326</sup> The order directed that each executive department and agency require that all contractors certify that they were in compliance with the wage and price guidelines.<sup>327</sup> The program was dubbed "voluntary" but denied government contracts over \$5 million to contractors who would not comply. Section 205(a) of the Federal Property and Administrative Services Act of 1949 (FPASA)<sup>328</sup> provided that the President could "prescribe such policies and directives not inconsistent with the provisions of the Act, as he shall deem necessary to effectuate the provisions of said Act." Section 201 of FPASA required that procurement and policy be conducted in a manner "advantageous to the Government in terms of economy, efficiency and service."<sup>329</sup>

A slight diversion from the facts of *AFL-CIO v. Kahn* is in order to set forth the function of the FPASA. The FPASA was enacted to solve the procurement and property management problems the government experienced during World War II:<sup>330</sup>

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Council on Wage and Price Stability Act, 12 U.S.C. § 1904 notes (1976), *as amended by* Act of May 10, 1979, Pub. L. No. 96-10, 93 Stat. 23.

<sup>324</sup> 618 F. 2d at 785-86.

<sup>325</sup> 3 C.F.R. 249 (1979), *reprinted in* 41 U.S.C.A. § 403 (West Supp. 1979).

<sup>326</sup> Egerton, *supra*, note 12, at 211 (footnotes omitted).

<sup>327</sup> 618 F.2d at 786.

<sup>328</sup> 63 Stat. 377; *codified as amended* in scattered sections of 40, 41, 44, and 50 U.S.C.

<sup>329</sup> *Id.* § 201.

<sup>330</sup> Egerton, *supra*, note 12, at 206.

The first element of this response was the 1947 passage of the Armed Services Procurement Act, which regulated military procurement. Nonmilitary procurement remained under the direction of an 1861 statute. Legislative action to correct the perceived inadequacies of this arrangement was spurred by the 1949 report of the Commission on Organization of the Executive Branch of the Government, popularly known as the Hoover Commission. The report concluded that the nonmilitary supply, records management, and public buildings functions of the Federal government were poorly managed and in need of central direction. The Commission recommended that a General Services Agency be created with the responsibility for overseeing government purchases and property management.<sup>331</sup>

The government sought to simplify Federal acquisition even then, in 1949. The purpose of the Act was outlined by Representative Holifield:

This bill establishes a basis for a plan to **simplify the procurement, utilization, and disposal of Government property**, and to reorganize certain agencies of the Government, and for other purposes.

The major purpose of this bill is to provide for a uniform system of property management and supply for the entire Federal Government. Accordingly H.R. 4754 creates a new General Services Administration [GSA], which will include the property-management functions now scattered among several Federal agencies and carry with it certain other related service activities. . . .<sup>332</sup> (emphasis added).

The Act directed the GSA to oversee procurement for the executive agencies,<sup>333</sup> creating “a uniform yet flexible system—Government-wide—for procurement, warehousing, property identification, supply, traffic management, and management of public utility services. . . .”<sup>334</sup> Congress established the GSA as an independent agency, yet provided for presidential appointment of the GSA director and presidential control over the agency’s policies.<sup>335</sup> Control over policy was limited, however. “The President

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<sup>331</sup> *Id.* (footnotes omitted).

<sup>332</sup> *Id.* at 207, citing 95 CONG. REC. 7441 (1949) (remarks of Rep. Holifield) (emphasis added).

<sup>333</sup> Egerton, *supra* note 12, at 207, citing 40 U.S.C. § 481 (1976).

<sup>334</sup> Egerton, *supra* note 12, at 207, citing 95 CONG. REC. 7442 (1949) (remarks of Rep. Holifield).

<sup>335</sup> Egerton, *supra* note 12, at 207 (footnotes omitted).

may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.”<sup>336</sup>

With that background on FPASA, let’s return to the facts of *AFL-CIO v. Kahn*.<sup>337</sup>

On January 4, 1979, the Office of Federal Procurement Policy issued a final Policy Statement providing that offerors that the Council determined were not in compliance with President Carter’s wage and price standards were ineligible for Federal contract awards anticipated to exceed \$5 million.<sup>338</sup> The standards applied directly to expenditures amounting to about fifty to sixty-five percent of all government acquisition funds.<sup>339</sup>

In May 1979, the AFL-CIO and nine of its affiliated international unions challenged the Order and the implementing regulations, claiming they exceeded presidential authority.<sup>340</sup> The labor unions argued that the order was not consistent with the policies of FPASA which addressed economy within the executive branch rather than in the nation as a whole.<sup>341</sup> The unions argued that an existing affirmative congressional policy that inflation be combated by free market forces rather than wage-price regulation precluded presidential action to the contrary.<sup>342</sup> The unions also argued that FPASA did not authorize the President to use the procurement process to pursue national objectives that were essentially unrelated to procurement. The government argued in response that

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<sup>336</sup> *Id.*, citing 40 U.S.C. § 486(a) (1976).

<sup>337</sup> 618 F.2d 784 (D.C. Cir. 1979).

<sup>338</sup> Egerton. *supra*, note 12, at 211 (footnotes omitted).

<sup>339</sup> *Id.* at 212.

<sup>340</sup> *Id.*

<sup>341</sup> 618 F.2d at 786.



the reduction of aggregate inflation would reduce the overall procurement costs confronted by the government.<sup>343</sup>

The district court for the District of Columbia granted the unions' motion for summary judgment. The court held that because the order's wage-price standards were "mandatory" since the government contract debarment threat created an element of compulsion, the wage-price program could not be authorized by the Council on Wage and Price Stability Act.<sup>344</sup> The district court also found the mandatory nature of the program in direct conflict with expressed congressional intent to terminate government wage-price controls, raising a separation of powers issue.<sup>345</sup> The court also rejected the FPASA as an alternative source of authority for the wage-price program, stating, "[s]uch an indirect and uncertain means of achieving economy in government buying was certainly not contemplated nor would it appear that Congress would have desired such a result when it enacted the [Act]."<sup>346</sup> The court distinguished several antidiscrimination executive orders<sup>347</sup> which effected procurement by noting that Congress took notice of and approved the antidiscrimination Executive order program.<sup>348</sup> The district court also noted

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<sup>342</sup> Egerton, *supra*, note 12, at 212.

<sup>343</sup> 618 F.2d at 793.

<sup>344</sup> *Id.* at 794.

<sup>345</sup> *Id.*

<sup>346</sup> No. 79-802, slip op. at 11 (D.D.C. May 31, 1979).

<sup>347</sup> Executive Ord. No. 8802, 3 C.F.R. 957 (1938-1943 compilation) (full participation in the national defense program by all citizens regardless of race, creed, color, or national origin); Executive Ord. No. 10,479, 3 C.F.R. §961 (1949-1953 compilation) (promote equal employment opportunity for all qualified persons employed or seeking employment on government contracts); Exec. Ord. No. 10,925, 3 C.F.R. § 448 (1959-1963 compilation) (discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States); Executive Ord. No. 11,114, 3 C.F.R. §774 (1959-1963 compilation) (encourage by affirmative action the elimination of discrimination); Executive Ord. No. 11,246, 3 C.F.R. §339 (1964-1965 compilation) (continuing equal opportunity program in each executive department and agency), *all cited in* Egerton, *supra* note 12, at 219 n 100.

<sup>348</sup> No. 79-802, *supra*, note 346, slip op. at 17.

that Congress had historically occupied the wage-price regulation field, delegating power to the President only sparingly in that area.<sup>349</sup>

One commentator applauded the district court's approach, especially in light of Congress' tight rein on the President in the wage-price and procurement fields:

[There is a] need to interpret broad statutory grants within the context of congressional intent, and thus limit executive power by tying the close nexus test to the intent of Congress to narrow the general statutory grant. **Hence, in the procurement area, strong congressional expressions of a desire to occupy the field effectively narrow the President's options and limit the President to actions in close nexus with the procurement functions as reinterpreted in light of congressional statements.**<sup>350</sup> (emphasis added).

Despite the district court's apparently sound analysis, the Court of Appeals for the District of Columbia Circuit reversed, finding that the standards were not mandatory because there was no "right" to a Government contract.<sup>351</sup> The court went further, however, and stated that even if the standards were mandatory, the FPASA provided an independent statutory basis for the wage-price program.<sup>352</sup> The court held that these restrictions on government contractors were sufficiently related to contracting economy and efficiency as to be authorized by Federal procurement legislation.<sup>353</sup> Even so, the majority expressed deep reservations, however, about the notion that implied presidential

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<sup>349</sup> Egerton, *supra*, note 12, at 215.

<sup>350</sup> *Id.* at 233 (emphasis added).

<sup>351</sup> 618 F.2d at 794, *citing* Perkins v. Luken Steel Co., 310 U.S. 113, 127 (1940).

<sup>352</sup> 618 F.2d at 795.

<sup>353</sup> *Id.* at 787-88.

authority alone was sufficient to support such programs.<sup>354</sup> It is significant that three D.C. Circuit justices dissented as did three Supreme Court justices on the denial of certiorari.<sup>355</sup>

In *ALF-CIO v. Kahn*,<sup>356</sup> President Carter's order specifically cited the Federal Procurement and Administrative Service Act (FPASA) as its authority, and the Court of Appeals for the District of Columbia found the government had established a "sufficiently close nexus" between the FPASA's policies of "economy" and "efficiency" and the wage price guidelines.<sup>357</sup> The court found that Congress *did* intend to inject broad social policies into the procurement process.<sup>358</sup> Here specifically, two months prior to the court's opinion, Congress approved a one-year extension of the Council on Wage and Price Stability Act (COWPSA),<sup>359</sup> tripling its budget and increasing its staff sixfold.<sup>360</sup> The court found that "... [i]t strains credulity to maintain that COWPSA bars the procurement compliance program when Congress has just extended that statute knowing that the Council it established is charged with implementing the wage and price guidelines on which the procurement program is based."<sup>361</sup>

One major criticism of the *AFL-CIO v. Kahn* decision is its failure to provide a clear description of the required nexus between presidential action and the FPASA or to identify factors that should be considered in determining whether a given action has such a

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<sup>354</sup> Monaghan, *supra*, note 164, at 61, citing *AFL-CIO v. Kahn*, 618 F.2d at 791, n 40 (*criticizing Contractor's Ass'n v. Secretary of Labor*, 442 F.2d 159, 170-71 (3d Cir.) *cert. denied*, 404 U.S. 854 (1971)).

<sup>355</sup> Monaghan, *supra*, note 164, at 60-61.

<sup>356</sup> 618 F.2d 784 (D.C. Cir. 1979).

<sup>357</sup> *Id.* at 792.

<sup>358</sup> *Id.* at 790-91.

<sup>359</sup> P.L. 93-387, 88 Stat. 750, 12 U.S.C.S. § 1904 note (1974), as amended by P.L. 94-78, 89 Stat. 411 (1975), P.L. 95-121 (1977), and P.L. 96-10 (1979).

<sup>360</sup> 618 F.2d at 795.

<sup>361</sup> *Id.* at 796.

nexus.<sup>362</sup> The Court of Appeals for the District of Columbia Circuit makes some suggestion, with the use of the antidiscrimination Executive Orders examples, that “the close nexus analysis need not focus on the primary thrust of the order or program, but that a court may find a secondary purpose or effect that satisfies the test.”<sup>363</sup> Under the *AFL-CIO v. Kahn* decision, it appears that even in particular circumstances where a presidential program is at odds with procurement goals, the Federal Property and Administrative Services Act’s authorization of the program might not be defeated.<sup>364</sup> This interpretation would significantly expand the President’s power.

In *Liberty Mutual Ins. Co. v. Friedman*,<sup>365</sup> the Fourth Circuit Court of Appeals applied the “close nexus” test to Executive Order 11,246,<sup>366</sup> which prohibited contractors and subcontractors with the Federal government from discriminating on the basis of race, color, religion, sex, or national origin and required them to take affirmative action to ensure equal employment opportunity.<sup>367</sup> Here, the executive order specifically cited section 205(a) of FPASA as its authority. FPASA authorizes executive orders but makes no mention of employment discrimination issues.<sup>368</sup> The Fourth Circuit Court of Appeals held that the required “close nexus” did not exist because FPASA did not mention an affirmative action policy.<sup>369</sup> The court stated that there had to be findings of fact showing that the problems addressed by the executive order are those addressed by the statute

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<sup>362</sup> Egerton, *supra* note 12, at 217.

<sup>363</sup> *Id.* at 218.

<sup>364</sup> *Id.* at 220.

<sup>365</sup> 639 F.2d 164 (4<sup>th</sup> Cir. 1981).

<sup>366</sup> 42 U.S.C. § 4802 (1976).

<sup>367</sup> 639 F.2d at 165-66.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.* at 170-71.

whose authority is invoked.<sup>370</sup> The court specifically distinguished *AFL-CIO v. Kahn*,<sup>371</sup> stating, “. . . the several opinions of the court took great pains to emphasize that the court’s holding was rested narrowly upon the manifestly close nexus between the Procurement Act’s criteria of efficiency and economy and the Executive Order’s predominant objective of containing procurement costs [through inflation control].”<sup>372</sup>

“The ‘close nexus’ test suggests that executive action taken under the ‘take Care’ clause cannot use congressionally delegated means simply to achieve presidential policy objectives.”<sup>373</sup> *Liberty Mutual Ins. Co. v. Friedman*<sup>374</sup> and the commentators in the law review articles mentioned above further support the view that *AFL-CIO v. Kahn*<sup>375</sup> was wrongly decided or must be strictly limited to its facts.

An interesting side issue arises with the regard to the notion of “rights” to obtain Government contracts. A year after *AFL-CIO v. Kahn* was decided, the Court of Appeals for the District of Columbia Circuit decided *Old Dominion Dairy Products, Inc. v. Secretary of Defense*.<sup>376</sup> Although *Old Dominion* involved a contractor’s due process liberty interest in protecting itself from being labeled as “lacking integrity” and thus failing to meet a responsibility determination, the court reasoned that a corporation may possess

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<sup>370</sup> *Id.* at 171.

The connection between the cost of worker’s compensation policies, for which employers purchase a single policy to cover employees working on both Federal and non Federal contracts without distinction between the two, and increase in the cost of Federal contracts that could be attributed to discrimination by these insurers in simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives.

*Id.*

<sup>371</sup> 618 F.2d 784 (D.C. Cir. 1979).

<sup>372</sup> 639 F.2d 164, 170 (4<sup>th</sup> Cir. 1981).

<sup>373</sup> Rodriguez, *supra*, note 8, at 537, citing *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d at 171.

<sup>374</sup> 639 F.2d 164.

<sup>375</sup> 618 F.2d 784 (D.C. Cir. 1979).

a due process liberty interest by virtue of its ability to contract and engage in the common occupations of life.<sup>377</sup> Although there is no “right” to government contracts, the government cannot act arbitrarily, either substantively or procedurally, or in such a way as to disable a person or corporation from challenging the processes and evidence before he is officially declared ineligible for government contracts.<sup>378</sup> Perhaps *Old Dominion* would give government contractors an avenue to challenge the toxic release certification requirements of Executive Order 12,969.

The foundations of federal acquisition reform have been laid and the various sources of executive authority set forth. We will next examine how President Clinton’s Executive Order 12,969 fits or does not fit with these principles.

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<sup>376</sup> 631 F.2d 953 (D.C. Cir. 1980).

<sup>377</sup> *Id.* at 961-62.

<sup>378</sup> *Id.*

### CHAPTER THREE: HOW ACQUISITION REFORM LEGISLATION AND THE SEPARATION OF POWERS DOCTRINE CONFLICT WITH EXECUTIVE ORDER 12,969

An area of concern for the future after the enactment of FASA emphasized by Senator Bingaman was that the Administration would be “likely to identify additional statutes that should be modified or repealed as a result of its ongoing acquisition reform and pilot program activities.”<sup>379</sup> Despite the taxpayers’ right to have government funds spent wisely, he cautioned against applying a legislative or regulatory solution to every acquisition problem.<sup>380</sup> Unfortunately, instead of peeling away more impediments to acquisition reform, the Clinton Administration, through Executive Order 12,969, has heaped on new requirements that directly conflict with the goals of acquisition reform.

#### **Contradiction with Acquisition Reform Principles.**

FARA abhors unnecessary certifications by contractors.<sup>381</sup> Although FASA doesn’t directly deal with certifications and the like, its sweeping reform to simplify the acquisition process<sup>382</sup> surely doesn’t condone requirements forcing contractors to recertify their compliance with existing law. Yet the Clinton Administration’s proclaimed embrace of the principles of acquisition reform puts up a roadblock to progress in this area.

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<sup>379</sup> Bingaman, *supra*, note 66, at 163.

<sup>380</sup> *Id.*

<sup>381</sup> See text accompanying notes 145-147, *supra*.

<sup>382</sup> See text accompanying notes 112-113, *supra*.

Regardless of the existence of EPCRKA, the importance of the express intent of Congress in its collateral acquisition reform legislation cannot be overlooked.<sup>383</sup>

The burden of the executive order is lessened slightly by the fact that it applies only to “competitive acquisition contracts expected to equal or exceed \$100,000,”<sup>384</sup> the amount of the “simplified acquisition threshold” under FASA.<sup>385</sup> The order itself claims that this limitation makes its provisions “consistent” with FASA.<sup>386</sup> Any benefit from this threshold is nullified because the implementing guidance issued by EPA clearly states that the executive order applies to contractors and first-tier subcontractors by requiring the first-tier subcontractor to certify to the prime contractor.<sup>387</sup> By refining the definition of “Federal contractor” in their guidance, the EPA has also determined that the executive order only applies to entities that have one or more facilities

... that will be used in the performance of the contract located in any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States has jurisdiction. . . .<sup>388</sup>

With regard to commercial items, the EPA’s guidance is somewhat confusing. The guidance clearly states that the EPA interprets the executive order to apply to the acquisition of commercial items. However, the FAR requires commercial item contracts to include a clause that “[t]he Contractor shall comply with all applicable Federal, State

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<sup>383</sup> See text accompanying note 227-229, *supra*.

<sup>384</sup> Exec. Order No. 12,969, § 3-301 and § 3-306, 60 Fed. Reg. 40,989 (1995); Office of Federal Procurement Policy Act, 41 U.S.C. § 403(11), *as amended* by the Federal Acquisition Streamlining Act, §4001.

<sup>385</sup> Pub. L. No. 103-355 § 4001, 41 U.S.C. §403(11).

<sup>386</sup> Exec. Order No. 12,969, *supra*, at § 3-306.

<sup>387</sup> Guidance Implementing Executive Order 12969; Federal Acquisition: Community Right-To-Know: Toxic Chemical Release Reporting, 60 Fed. Reg. 50,738, 50,739 (1995).

<sup>388</sup> *Id.*



and local laws, executive orders rules and regulations applicable to its performance under this contract.”<sup>389</sup> Thus, the EPA believes that commercial items contracts need not contain an additional solicitation certification or contract clause to implement the executive order.<sup>390</sup>

Even though commercial items have no additional contract requirements, the impact of Executive Order 12,969 on larger and major systems purchases is likely to be significant. Recall the testimony of Steven Kelman on August 3, 1995, before the House of Representatives Committee on Small Business that “FASA focuses mainly on smaller dollar purchases. To ensure that our system effectively provides increased value to taxpayers we must also reform the way we make larger dollar buys.”<sup>391</sup>

#### **Contradiction with the Separation of Powers Doctrine.**

Executive Order 12,969 violates the separation of powers doctrine because it does not have a basis for its authority in either the Constitution, as delegated by statute from Congress, or as a matter of custom.

“Clearly, where executive action contradicts either the terms or the intent of a statute, a court may invalidate that action.”<sup>392</sup> The certification, solicitation, and contract clause requirements of Executive Order 12,969 are similar to other tenuous socioeconomic mandates imposed on government contractors by executive order.

Professor Monaghan writes:

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<sup>389</sup> 48 C.F.R. § 52.212-4(q).

<sup>390</sup> Guidance Implementing Executive Order 12969; Federal Acquisition; Community Right-To-Know; Toxic Chemical Release Reporting, 60 Fed. Reg. 50,738; 50,739; 50,740 (1995).

<sup>391</sup> *Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of Steven Kelman, Administrator, office of Federal Procurement Policy, Office of Management and Budget).

Currently, the most troublesome cases regarding the scope of legitimate public administration—as opposed to impermissible presidential law-making—concern government contractors. These contractors must now comply with presidentially imposed affirmative action programs. This requirement was initially established by Executive Order 11,246 [directing the Secretary of Labor to make certain disclosures pursuant to the FOIA regarding employment of women and minorities], the statutory origins of which, as the Supreme Court gingerly observed in *Chrysler Corp. v. Brown*,<sup>393</sup> “are somewhat obscure and have been soundly debated by commentators and courts.”<sup>394</sup>

President Clinton claims the following as sources of authority for issuing Executive Order 12,969:<sup>395</sup> the authority vested in him as President by the Constitution and the laws of the United States of America—including the Emergency Planning and Community Right-To-Know Act (EPCRA);<sup>396</sup> the Pollution Prevention Act (PPA);<sup>397</sup> the President’s power to manage and dispose of government property;<sup>398</sup> the President’s power to prescribe directives;<sup>399</sup> and the President’s general authority to delegate functions to the head of a department or agency.<sup>400</sup>

**Authority stemming from the Constitution—the “vested” clause.** Justice Black emphasized in *Youngstown Sheet & Tube*<sup>401</sup> that Congress, and *only* Congress, has the authority to make laws—the President merely executes them.<sup>402</sup> Because Executive Order 12,969 is so similar to the provisions of EPCRA itself, it represents *legislating* on the part of the President and clearly cannot find a source of authority in the “vested”

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<sup>392</sup> Rodriguez, *supra*, note 8, at 533.

<sup>393</sup> 441 U.S. 281 (1979).

<sup>394</sup> Monaghan, *supra*, note 164, at 59-60 (other citations omitted).

<sup>395</sup> Preamble, Exec. Order No. 12,969, 60 Fed. Reg. 40,989 (1995).

<sup>396</sup> 42 U.S.C. § 11001.

<sup>397</sup> 42 U.S.C. § 13101.

<sup>398</sup> 40 U.S.C. § 471.

<sup>399</sup> 40 U.S.C. § 486(a).

<sup>400</sup> 3 U.S.C. § 301.

<sup>401</sup> 343 U.S. 579 (1952).

clause. Congress did delegate many details of EPCRKA administration to the EPA, particularly with regard to toxic release reporting. However, Congress itself specified that release reporting apply to facilities with ten or more full-time employees in Standard Industrial Classification (hereinafter SIC) Codes 20 through 39;<sup>403</sup> set forth the initial list of chemicals covered;<sup>404</sup> and initially set forth the threshold amounts released to trigger reporting.<sup>405</sup> The statute does provide that the EPA Administrator may add or delete SIC Codes;<sup>406</sup> move to apply the reporting requirements to any particular facility;<sup>407</sup> revise the list of toxic chemicals covered;<sup>408</sup> revise the threshold amount;<sup>409</sup> and modify the frequency of submitting a report.<sup>410</sup> However, President Clinton's addition of completely identical reporting requirements in the *acquisition arena* bear no relationship to the statute's purpose of planning for toxic emergencies and informing the public of the toxic chemicals in existence in their communities.

**Authority stemming from the Constitution—the “take Care” clause.** The provisions of EPCRKA with regard to toxic release reporting are “self-executing”—or at least nothing is added to “faithfully execute” them by merely requiring contractors to recertify that they have complied with the law. The Justice Department, in supporting the basis for one of President Reagan's executive orders,<sup>411</sup> believed the “take Care” clause to

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<sup>402</sup> *Id.* at 589.

<sup>403</sup> 42 U.S.C. § 11023(b)(1)(A).

<sup>404</sup> 42 U.S.C. § 11023(c).

<sup>405</sup> 42 U.S.C. § 11023 (f).

<sup>406</sup> 42 U.S.C. § 11023 (b)(1)(B).

<sup>407</sup> 42 U.S.C. § 11023 (b)(2).

<sup>408</sup> 42 U.S.C. § 11023 (d).

<sup>409</sup> 42 U.S.C. § 11023 (f)(2).

<sup>410</sup> 42 U.S.C. § 11023(i).

<sup>411</sup> Exec. Order. No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted in* 5 U.S.C. § 601 app. at 31.

encompass a general coordinating function in pursuing broad public interests.<sup>412</sup> Although a concern for the public and environment is clearly asserted by President Clinton, Justice Frankfurter's concurring opinion in *Youngstown Sheet & Tube* puts to rest the notion that public interest should prevail.<sup>413</sup> The Justice Department's stance was also based on the assumption that Congress did not affirmatively limit President Reagan.

The author was unable to disclose any discussion of Executive Order 12,969 in the legislative history of FARA. With the passage of FARA, however, Congress has made explicitly clear its limits on certification requirements in Federal contracts. This conflict between executive and legislative purposes puts President Clinton's power "at its lowest ebb"<sup>414</sup> and also denies any source of power from Justice Jackson's "zone of twilight."<sup>415</sup>

**Authority stemming from custom or acquiescence.** Congress' tight control over the Federal acquisition area is contrary to the suggestion of any acquiescence to presidential action in this field.<sup>416</sup> Presidents have, nevertheless, in the past required by executive order that contractors make certain certifications. Other than Executive Order 12,969, the author found two other examples of executive orders requiring Federal contractors to certify to some aspect of a presidential prerogative. Executive Order 12,092<sup>417</sup> required contractors to certify compliance with wage and price guidelines.<sup>418</sup> Executive Order 12,933, Nondisplacement of Qualified Workers Under Certain

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<sup>412</sup> Rodriguez, *supra* note 8, at 515.

<sup>413</sup> 343 U.S. at 609-610.

<sup>414</sup> *Id.* at 637-38.

<sup>415</sup> See text accompanying notes 211-221, *supra*.

<sup>416</sup> See, *supra*, note 350 and accompanying text.

<sup>417</sup> 43 Fed. Reg. 51375 (1978).

<sup>418</sup> See, text accompanying note 327, *supra*.

Contracts,<sup>419</sup> requires contractors to certify the names of all employees working at a Federal facility during the last month of contract performance.<sup>420</sup> But three examples does not a “custom” make.<sup>421</sup>

**Authority delegated by Congress—FPASA.** The President makes an attempt, in the preamble, to relate the purpose of Executive Order 12,969 to FPASA’s contracting efficiency goal by stating that acquisition savings will result from reducing remediation costs and worker claims.<sup>422</sup> Generally, however, remediation worker claims would not be passed back to the government unless the contract in question was an open cost-reimbursable contract.<sup>423</sup> Further, even if one were to consider the decision in *AFL-CIO v. Kahn*<sup>424</sup> to be sound, an acquisition requirement *which already exists* by virtue of EPCRKA cannot, under any interpretation, anticipate additional economy and efficiency in federal procurement. The Supreme Court’s decision in *Chrysler Corporation v. Brown*,<sup>425</sup> which found no nexus between FPASA’s acquisition economy and efficiency and executive orders requiring the Secretary of Labor to disclose information about the employment of women and minorities, seems more applicable to Executive Order 12,969.

**Authority delegated by Congress—EPCRKA.** With EPCRKA, Congress passed legislation setting forth requirements for *all entities*, including Federal contractors, to file certain toxic chemical release forms and inventories.<sup>426</sup> The Executive Order itself

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<sup>419</sup> 59 Fed. Reg. 54,949 (1994).

<sup>420</sup> *Id.*

<sup>421</sup> See text accompanying notes 255-256. *supra*; *Youngstown Sheet & Tube*, 343 U.S. 589.

<sup>422</sup> Preamble, Exec. Order No. 12,969, 60 Fed. Reg. 40,989 (1995).

<sup>423</sup> See generally, FAR Subpart 16.3, 48 C.F.R. Part 16.3.

<sup>424</sup> 618 F.2d 784, 790 (1979), *cert. denied*, 99 S. Ct. 3107 (1979).

<sup>425</sup> 441 U.S. 281 (1979).

<sup>426</sup> 42 U.S.C. § 11023.

did not add new SIC Codes, does not change threshold amounts, and does not change the list of toxic chemicals covered.<sup>427</sup> The executive order just adds another layer of bureaucracy and paperwork to the acquisition process by requiring solicitations, offers, and resulting contracts to include provisions stating, essentially, that offerors and ultimate awardees have complied with the toxic chemical reporting provisions of EPCRKA.<sup>428</sup> Clearly the President is acting beyond the scope of his constitutional function.

It is significant that two statutes—the CAA and the CWA—contain the express intentions of Congress to bar or impede companies from contracting with the Federal government because of environmental violations.<sup>429</sup> Congress is obviously aware of this environmental leverage, but has chosen not to amend EPCRKA or other environmental statutes to include similar types of provisions.

**Authority delegated from Congress—the nexus text.** EPCRKA, the primary legislation under which President Clinton claims his authority, sets forth no stated purpose or policy in the text of the statute. On the other hand, the PPA, also claimed as authority, sets forth the following policy:

The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment

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<sup>427</sup> On 26 June, 1996, the Administration added electric utilities, incinerator operators, recyclers and many mining companies to the list of those who must report—at an estimated cost to industry of \$331 million. H. Josef Hebert, *Toxic Emission Requirements Are Expanded: U.S. Adds Industries to Those Who Report*, WASH. POST, June 27, 1996.

<sup>428</sup> Exec. Order No. 12,969, §§ 3 and 4, 60 Fed. Reg. 40,989 (1995).

<sup>429</sup> See, text accompanying notes 431–442, *infra*.

should be employed only as a last resort and should be conducted in an environmentally safe manner.<sup>430</sup>

Requiring entities to file public reports of the amount of toxics they release into the environment *may* pressure them to reduce that amount. This in turn *may* also lead to meeting the goals of FPASA of greater economy and efficiency by eventually reducing acquisition costs. Depending on the price of substitutes or re-engineering to reduce the amount of toxic chemicals used, costs to the government could significantly increase. Any connection is very remote, however, and requires a quantum leap of legalistic faith to get there. Contractors already receive these pressures under EPCRA itself, and contract costs should already reflect these uncertainties.

Executive Order 12,969 clearly lacks a valid source of authority and directly conflicts with express congressional intent for acquisition reform. Another of its weaknesses, its redundancy, is covered in Chapter Four.

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<sup>430</sup> 42 U.S.C. §13101(b).

## CHAPTER FOUR: EXECUTIVE ORDER 12,969 IS REDUNDANT AND SHOULD BE REPEALED

The certification, specification and contract clause requirements of Executive Order 12,969 add no value to the acquisition process or the community's right-to-know about releases of toxic chemicals into the environment. Subchapter II of the Emergency Planning and Community Right-To-Know Act (EPCRKA)<sup>431</sup> sets forth the same reporting requirements as Executive Order 12,969 with regard to toxic releases,<sup>432</sup> as well as additional reporting requirements regarding material safety data sheets<sup>433</sup> and emergency and hazardous chemical inventory forms.<sup>434</sup> EPCRKA has a comprehensive enforcement mechanism with provisions for criminal, civil and administrative penalties for noncompliance.<sup>435</sup> In addition, the statute contains citizen suit provisions for private enforcement actions against an "owner or operator."<sup>436</sup>

"The prevalent view among contracting professionals is that contractors are expected to comply with all legal requirements unless the contract specifies otherwise."<sup>437</sup> This legal obligation of government contractors to comply with environmental laws is well-established<sup>438</sup> and doesn't need to be supplemented with redundant executive orders.

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<sup>431</sup> 42 U.S.C. §§ 11021 - 11023.

<sup>432</sup> *Id.* at § 11023.

<sup>433</sup> *Id.* at § 11021.

<sup>434</sup> *Id.* at § 11022.

<sup>435</sup> *Id.* at § 11045.

<sup>436</sup> *Id.* at § 11046.

<sup>437</sup> Arnold W. Reitze, Jr., Air Pollution Law § 21-8, n 191 (1995).

<sup>438</sup> At the Federal level, the major environmental laws affecting government contractors include: The Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2671 (1988 & Supp. V 1993); the Clean Water



As will be discussed, there are already many incentives for contractors to comply with environmental laws. At the same time, section 4301 of FARA<sup>439</sup> specifically eliminates certifications, solicitation provisions and contract clauses like those imposed under Executive Order 12,969 in order to streamline the federal acquisition process.<sup>440</sup>

Despite the myriad number of environmental statutes, only two contain specific provisions expressing congressional intent to bar or impede entities from contracting with the Federal government because of environmental violations. The Clean Air Act (CAA)<sup>441</sup> and the Clean Water Act (CWA)<sup>442</sup> prohibit agencies from awarding contracts to any

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Act (CWA), 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993); the Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f to 300j-26 (1988); the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992); the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992); *all cited in* Chris M. Amantea and Stephen C. Jones. *The Growth of Environmental Issues in Government Contracting*, 43 Am. U.L. Rev. 1585, 1587 (Sum. 1994); the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544; and the Emergency Planning and Community Right-To-Know Act (EPCRTKA), 42 U.S.C. §§11001-11050.

<sup>439</sup> Pub. L. No. 104-106, § 4301, 110 Stat. 186.

<sup>440</sup> A somewhat persuasive argument was made prior to the passage of FARA. however, by small business concerns for maintaining certification requirements:

[T]he elimination of certification requirements that have a statutory basis can work to the detriment of small contractors. The argument that a certification is not needed when the contractor is bound to comply with the underlying statutory requirement sounds reasonable, but may not be practical. Small firms find it more difficult to keep track of the host of statutory requirements applicable to them. Certifications implementing such statutory requirements have the benefit of informing the small contractor of the statutorily-imposed requirement and putting the firm on notice to explore what its obligations are under the statute. Without such certification a small firm may remain ignorant of a statutory obligation which will then be applied against the firm as part of the administration of the contract.

*Federal Acquisition Streamlining: Testimony Before the House Committee on Small Business*, 104<sup>th</sup> Cong. (1995) (statement of E. Colette Nelson, the Executive Vice President, American Subcontractors' Association). Small business should reasonably be expected to comply with environmental laws without notice from a solicitation requirement or contract clause. "Ignorance is no defense" to subcontractors or other individuals who are required to comply with laws as complicated as the Internal Revenue Code.

<sup>441</sup> 42 U.S.C. §7606.

<sup>442</sup> 33 U.S.C. §1368.

entity that has been convicted of a CAA or CWA criminal violation if the contract is to be performed at the facility at which the violation occurred.<sup>443</sup>

Two other effective remedies available to an agency for controlling environmental violations of *any nature* are debarment and suspension of contractors. Debarment and suspension are remedies that the government may utilize to preclude businesses and individuals from obtaining new government contracts, grants, loans, or other benefits for either a temporary or stated period.<sup>444</sup> Specifically, the FAR defines a "debarment" as the exclusion of "a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period."<sup>445</sup> A "suspension" is an agency action "to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting."<sup>446</sup> A debarment or suspension can have a significant negative impact on a business that depends on government work. "Indeed, contractors . . . may fear a debarment or suspension far more than criminal or civil sanctions because of the potentially adverse economic effect on their operations."<sup>447</sup>

Two commentators argue that the most significant factor with respect to government contractor liability is the U.S. Environmental Protection Agency's (EPA) recent focus on contractors as enforcement targets.<sup>448</sup>

The EPA, the primary Federal agency responsible for implementing and enforcing the nation's environmental laws, adopted a new policy in 1988 to "pursue the full range of [EPA] enforcement authorities against contractor

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<sup>443</sup> Reitze, *supra* note 437, at § 21-8.

<sup>444</sup> Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 Cath. U.L. Rev. 363 (1995).

<sup>445</sup> *Id.* at 364 n 2, quoting 48 C.F.R. § 9.403 (1993).

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 364 (footnotes omitted).

<sup>448</sup> Amantea and Jones, *supra*, note 438, at 1585.

operators of government-owned facilities in appropriate circumstances." In addition, government contractors face increasingly comprehensive and stringent regulatory requirements of Federal, state, and local environmental laws, and the explosive growth in the last decade of environmental liabilities imposed by Federal and state courts.<sup>449</sup>

Federal contractors are also subject to state environmental laws, many of which are even more stringent than their Federal counterparts. Executive Order 12,088<sup>450</sup> directs Federal facilities to comply with applicable state pollution control standards, and, consequently, government contractors involved at those facilities must also comply with state law.<sup>451</sup>

State common-law tort theories are also a source of liability for government contractors.<sup>452</sup> Theories such as nuisance, trespass, and strict liability, may make a contractor liable for damages or injunctive relief for injuries related to environmental contamination, including toxic releases. In cases where the Federal government successfully invokes sovereign immunity, common law claims by individuals may expose a government contractor to liability in excess of its proportionate share.<sup>453</sup>

The bottom line is that Federal contractors are under great pressure and have a huge incentive to comply with environmental laws, including filing toxic release inventories. The additional certifications, specifications and contract clauses required by

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<sup>449</sup> *Id.* at 1587, citing Office of Fed. Activities, U.S. Env'tl. Protection Agency, Rep. No. 130/4-8g/003, Federal Facilities Compliance Strategy VI-14 (1988) [hereinafter Compliance Strategy]. *But cf.* *Environmental Compliance by Federal Agencies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 194-95 (1987) (statement of F. Henry Habicht II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice) (asserting that Justice Department does not treat government contractors differently than other private parties) [other footnotes omitted].

<sup>450</sup> 3 C.F.R. 243 (1979), reprinted in 42 U.S.C. § 4321 (1978).

<sup>451</sup> Amantea and Jones, *supra* note 438, at 1600.

<sup>452</sup> *Id.* at 1601.

<sup>453</sup> *Id.* at 1601-02 (footnotes omitted).

Executive Order 12,969 serve no purpose other than to charade a political image of President Clinton as an environmentalist.

Congress, federal agencies, and even perhaps federal contractors should challenge Executive Order 12,969 and call for its repeal. If presidents are allowed to continue to micromanage the federal acquisition process merely to gain a political advantage, it may not be long before the principles of custom and acquiescence set in and such orders can no longer be effectively challenged.<sup>454</sup>

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<sup>454</sup> See, *supra*, text accompanying notes 230-264 for a discussion of custom as a source of executive authority.

## CONCLUSION

This paper examined the history and development of Federal acquisition reform, which culminated in the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1996, and the Clinton Administration's alleged commitment to continued reform. It next set forth the sources of presidential authority to issue executive orders—the Constitution; congressional delegation by statute and collateral expressions of congressional intent, and custom. It reviewed the relevant Supreme Court cases which have shaped this presidential power. The paper illustrated the direct conflicts between the certification, solicitation, and contract clause requirements of Executive Order 12,969 and the solid principles of acquisition reform and the separation of powers doctrine. Finally, the paper set forth the conclusion that Executive Order 12,969 was redundant and unnecessary to effect compliance with toxic release reporting requirements in light of the provisions of EPCRA itself and the wide array of enforcement options already available to Federal agencies. An issue reserved for another paper is the president delegating to EPA the power to set procedures for statutorily authorized cabinet agencies.

Congress must be ever-vigilant to guard against encroachment by the Executive branch into the legislative realm. Executive Order 12,969 represents such an encroachment. True commitment and support of acquisition reform from the Administration, not political support that changes with the wind, is most important.<sup>455</sup> Allowing Congress to make laws with respect to the environment and Federal acquisition without micromanagement from the Administration is best for the environment.

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<sup>455</sup> Bingaman, *supra* note 66, at 164.

## APPENDIX

**Executive Order 12,969**—Federal Acquisition and Community Right-To-Know—August 8, 1995

The Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050) ("EPCRKA") and the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109) ("PPA") established programs to protect public health and the environment by providing the public with important information on the toxic chemicals being released into the air, land, and water in their communities by manufacturing facilities.

The Toxics Release Inventory ("TRI") established pursuant to section 313(j) of EPCRKA, 49 U.S.C. 11023(j), based on information required to be reported under section 313 of EPCRKA and section 6607 of PPA, 42 U.S.C. 13106, provides the public, industry, and Federal, State, and local governments with a basic tool for making risk-based decisions about management and control of toxic chemicals, that can have significant adverse effects on human health and the environment. TRI data allow the public, industry, and government to gauge the progress of industry and government efforts to reduce toxic chemical wastes.

Sharing vital TRI information with the public has provided a strong incentive for reduction in the generation, and, ultimately, release into the environment, of toxic chemicals. Since the inception of the TRI program, reported releases to the environment under TRI have decreased significantly.

The efficiency of the Federal Government is served when it purchases high quality supplies and services that have been produced with a minimum impact on the public health and environment of communities surrounding government contractors. Savings associated with reduced raw materials usage, reduced use of costly, inefficient end-of-pipe-line pollution controls, and reduced liability and remediation costs from worker and community claims all serve to increase the economic and efficient provision of essential supplies and services to the government. As a result of TRI reporting, many manufacturers have learned of previously unrecognized significant efficiencies and cost savings in their production processes.

The Federal Government's receipt of timely and quality supplies and services is also served by the general enhancement of relations between government contractors and the communities in which they are situated, as well as the cooperative working relationship between employers and employees who may be subject to exposure to toxic materials.

Information concerning chemical release and transfer can assist the government to purchase efficiently produced, lower cost, and higher quality supplies and services that also have a minimum adverse impact on community health and the environment.

Now, Therefore, to promote economy and efficiency in government procurement of supplies and services, and by the authority vested in me as President by the Constitution and the laws of the United States of America, including EPCRKA, 42 U.S.C. 11001 et seq., PPA, 42 U.S.C. 13101 et seq., 40 U.S.C. 471 and 486(a), and 3 U.S.C. 301, it is hereby ordered as follows:

Section 1. Policy. It is the policy of the executive branch in procuring supplies and services that, to ensure the economical and efficient procurement of Federal Government contracts, Federal agencies, to the greatest extent practicable, shall contract with companies that report in a public manner on toxic chemicals released to the environment.

Sec. 2. Definitions.

2-201. All definitions found in EPCRKA and PPA and implementing regulations are incorporated into this order by reference, with the following exceptions for purposes of this order.

2-202. "Federal agency" means an "Executive agency," as defined in 5 U.S.C. 105. For purposes of this order, military departments, as defined in 5 U.S.C. 102, are covered under the auspices of the Department of Defense.

2-203. "Acquisition" means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when the Federal department or agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

2-204. "Toxic chemical" means a substance on the list described in section 313(c) of EPCRKA, 42 U.S.C. 11023(c), as it exists on the effective date of this order.

2-205. "Administrator" means the Administrator of the United States Environmental Protection Agency ("EPA").

2-206. "Federal contractor" means an entity that has submitted the successful bid or proposal in response to a competitive acquisition solicitation.

### Sec. 3. Applicability.

3-301. Each Federal agency shall, to the maximum extent practicable, include in contract solicitations as an eligibility criterion for the award of competitive acquisition contracts expected to equal or exceed \$ 100,000 with the Federal contractors described in subsection 3-302, the requirement that such contractors must file (and continue to file for the life of the contract) a Toxic Chemical Release Form ("Form R"), as described in sections 313 (a) and (g) of EPCRKA, 42 U.S.C. 11023 (a) and (g), for each toxic chemical manufactured, processed, or otherwise used by the Federal contractor at a facility, as described in section 313 of EPCRKA, 42 U.S.C. 11023, and section 6607 of PPA, 42 U.S.C. 13106.

3-302. The Federal contractors subject to the eligibility criterion described in subsection 3-301 above are those who currently report to the TRI pursuant to section 313(b)(1)(A) of EPCRKA, 42 U.S.C. 11023(b)(1) (A), that is, manufacturers having Standard Industrial Classification Code ("SIC") designations of 20 through 39 (as in effect on July 1, 1985).

3-303. Each Federal agency shall find that a prospective Federal contractor has satisfied the requirement in subsection 3-301 if the contractor certifies in a solicitation that it:

- (a) Does not manufacture, process, or otherwise use any toxic chemicals listed under section 313(c) of EPCRKA, 42 U.S.C. 11023(c);
- (b) Does not have 10 or more full-time employees as specified in section 313(b)(1)(A) of EPCRKA, 42 U.S.C. 11023(b)(1)(A);
- (c) Does not meet the reporting thresholds established under section 313(f) of the EPCRKA, 42 U.S.C. 11023(f); or
- (d) Has complied fully with the reporting requirements of subsection 4-404.

3-304. Each Federal agency shall require the filings described in subsection 3-301 above to include information on all chemicals identified by the Administrator pursuant to section 313(c) of EPCRKA, 42 U.S.C. 11023(c), as of the date of this order.

3-305. Each Federal agency may amend existing contracts, to the extent permitted by law and where practicable, to require the reporting of information specified in subsection 3-301 above.

3-306. As consistent with Title IV of the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355, and section 4(11) of the Office of Federal



Procurement Policy Act, 41 U.S.C. 403(11), the requirements of this order are only applicable to competitive acquisition contracts expected to equal or exceed \$ 100,000.

#### Sec. 4. Implementation.

4-401. Not later than September 30, 1995, the EPA shall publish in the Federal Register guidance for compliance with this order, including applicability with respect to subcontractors.

4-402. Within 30 days of the issuance of the guidance provided for in subsection 4-401 above, each Federal agency shall include in all acquisition solicitations issued on or after the effective date of this order, the provisions necessary to effect this order.

4-403. For all contracts expected to exceed \$ 500,000, each Federal agency shall consult with the Administrator or the Administrator's designee when the agency believes it is not practicable to include the eligibility requirement of section 3-301 in the contract solicitation or award.

4-404. Each Federal agency shall require each Federal contractor designated in subsection 3-302 above to:

- (a) Have included in its response to the contract solicitation a certification, as specified in the guidelines published pursuant to subsection 4-401 of this order, that it will (if awarded the contract) comply with the requirements of subsection 3-301; and
- (b) File with the Administrator and each appropriate State pursuant to section 313(a) of EPCRA, 42 U.S.C. 11023(a), the information required by subsection 3-301, beginning on the next July 1 after the date on which the contract is awarded.

4-405. Information submitted to the EPA pursuant to subsection 4-404(b) above shall be subject to the trade secret protections provided by section 322 of EPCRA, 42 U.S.C. 11042. Information that is not trade secret shall be made available to the public pursuant to sections 313 (h) and (j) of EPCRA, 42 U.S.C. 11023 (h) and (j). The Administrator is directed to review reports submitted pursuant to this order to determine the appropriateness of any claims for trade secret protection.

4-406. When the Administrator determines that a Federal contractor has not filed the necessary forms or complete information as required by subsection 3-301 above, the Administrator or the Administrator's designee may recommend termination of the contract for convenience. The Administrator shall transmit that recommendation to the head of the contracting agency, and that agency shall consider the recommendation and determine whether to terminate the contract. In carrying out this responsibility, the Administrator

may investigate any subject Federal contractor to determine the adequacy of compliance with the provisions of this order and the Administrator's designee may hold such hearings, public or private, as the Administrator deems advisable to assist in the Administrator's determination of compliance.

4-407. Each contracting agency shall cooperate with the Administrator and provide such information and assistance as the Administrator may require in the performance of the Administrator's functions under this order.

4-408. Upon request and to the extent practicable, the Administrator shall provide technical advice and assistance to Federal agencies in order to assist in full compliance with this order.

## Sec. 5. General Provisions.

5-501. The requirements of this order shall be implemented and incorporated in acquisition regulations, including the Federal Acquisition Regulations (FAR), within 90 days after the effective date of this order.

5-502. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. This order is not intended, however, to preclude judicial review of final agency decisions in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

5-503. This order shall be effective immediately and shall continue to be in effect until revoked.

William J. Clinton  
The White House,  
August 8, 1995.